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v. 2

REPORTS OF CASES

DECIDED AT

NISI PRIUS

AND AT THE

CROWN SIDE ON CIRCUIT;

WITH

SELECT DECISIONS AT CHAMBERS.

BY

T. CAMPBELL FOSTER,

AND

W. F. FINLASON,

OF THE MIDDLE TEMPLE, ESQUIRES, BARRISTERS AT LAW.

VOL. II.

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REPORTS OF CASES

DECIDED AT

NISI PRIUS,

&c. &c.

NORTHERN CIRCUIT.

Carlisle, coram Hill, J.

1859.

Summer Assizes.

REGINA *v.* WHITTAKER.

Bench warrants not to be granted unless it is necessary that the party charged should be at once taken into custody.

LIDDELL moved in this case, in which two indictments had been found against the defendant for wilfully obstructing a highway at the preceding Liverpool Assizes, that a bench warrant should issue, in order that the defendant might be arrested and tried at Lancaster.

HILL, J., said that the practice determined on and adopted by the Judges was, not to issue bench warrants, unless from the nature of the crime it was necessary to have the party charged with the offence at once taken into custody, or unless it was shown that the party charged with the offence was about to quit the country (*a*). The Judge's clerk would make out a summons in the ordinary form, to be served upon the party, requiring him to appear in London at Judges' Chambers, to show cause why a bench warrant should not issue against him.

(*a*) That is, where bail would be refused. *Ex parte Barronet*, 1 E. & B. 1; 1 Dears. C. C. 51.

1859.

York, coram Wightman, J.

REGINA *v.* CLARKE.

Mistake in caption. An examination of a man touching injuries which he has received from a prisoner, if subsequently on the death of the injured man from the injuries he has received, appended to a caption charging the prisoner with his murder, is inadmissible in evidence on that charge, although it may be admissible as a dying declaration.

THOMAS CLARKE, aged forty-five, was indicted for the wilful murder of Patrick Coley, at Horton, on the 28th of August last.

Blanshard and *Wheelhouse* prosecuted.

Price defended the prisoner.

It appeared that both the prisoner and the deceased man were Irish, and that on the 28th of August last the prisoner had a christening and merry-making at his house, in the course of which alternate quantities of rum and beer were consumed. At night the deceased wanted half a gallon more beer sent for, which prisoner refused to allow. This led to a kind of wrangle between them, which led to a discussion as to the respective merits of their native counties, and to the prisoner eventually ejecting his friend, the deceased, from his house. The deceased attempted to get in again, but the door was locked. The deceased attempted to get in by kicking at the door, and, as his shoes were thin, he asked the bystanders assembled if any of them had thicker shoes on that he might kick the door-panel in. At length the prisoner, exasperated by this hammering at his door, opened it, and the deceased went in, and the prisoner was then seen to strike him three blows on the body, which were followed by loud screams of "murder!" from the deceased. It was found that the man had received three severe stabs in the body, and he was carried home and a surgeon sent for, who, being of opinion that he could not recover, from the nature of the wounds, a magistrate was sent for to take his deposition, and the prisoner was taken into custody. The statement of the deceased was then taken down in writing as a dying declaration, and next day, in the presence of the prisoner, this

statement was read over to him, and he said it was correct, "as a dying man." The deceased died two days afterwards, and on the 3rd of September the witnesses made their depositions before the magistrates against the prisoner on a charge of murder of the deceased, and the deposition of the deceased was included as having been taken on that charge under the same caption. On its being proposed by the learned counsel for the prosecution to put in evidence this deposition, it was objected by the learned counsel for the prisoner that it was taken on a charge of a different offence, namely, of cutting and wounding the deceased, who subsequently died.

WIGHTMAN, J.—The caption shows that the examination was taken on a charge of murder, and the caption shows that it is the examination of the man charged with being murdered, for the "murder" of himself.

Blanshard submitted that it was admissible, for the name of the person charged with being murdered might be struck out of the caption.

WIGHTMAN, J.—Then that would not be the charge on which he was examined.

Blanshard referred to *Beeston's Case* (*a*).

WIGHTMAN, J.—If the prisoner had been charged with feloniously cutting and stabbing the deceased, and the deceased had afterwards died, the deposition taken on the charge of cutting and stabbing might have been used on the charge of murder.

Blanshard submitted that the caption was sufficient.

WIGHTMAN, J.—Will it do without any caption at all? Unfortunately the charge in the caption is a charge of murder, and the caption states this to be the examination of the man who is charged as having been murdered. I want an authority where a man is charged with murder on

(*a*) 24 L. J., M. C. 5; 1 Dears. C. C. 405.

1859.

REGINA v. CLARKE.

the examination of the man murdered, before I can admit this.

Blanshard then proposed to put the document in evidence as a dying declaration. The evidence of the surgeon showed that he had told the deceased he had no chance of recovery before he made the statement, and he died two days after. When the surgeon told him that, the deceased spoke out and said, "Oh, I am a dying man."

WIGHTMAN, J., held the document admissible as a dying declaration after this evidence.

The examination of the deceased stated an account of the quarrel, and that the prisoner had stabbed him. The surgeon's evidence proving that these stabs had caused the death of the deceased,

The prisoner was found guilty of manslaughter, and sentenced to fifteen years' penal servitude.

Durham, coram Hill, J.

1860.

Spring Assizes.

Semble, that statements made to a priest or clergyman in sacramental or *quasi* sacramental confession are privileged, but anything said or done *out of* confession is *not* so, even although its disclosure may incidentally disclose the identity of the party.

REGINA *v.* HAY.

WILLIAM HAY, aged twenty-two, pitman, was charged with robbing Daniel Kennedy of a silver watch, at Jarrow, on the 25th December last.

Headlam for the prosecution.

Davidson for the defence.

On the 24th of December the prosecutor had been drinking at the Bee's-wing public-house, in the Felling, and left about twelve o'clock at night. On his way home, the ground being very slippery, he fell down, and was assisted to his feet by the prisoner and three other men. They walked a short distance together, but the prosecutor feeling the prisoner's hand in his pocket told him to take it out, which he did. The men then endeavoured to get the prosecutor to go a long way with them, but he refused,

and walked away by himself. After having left the prisoner and the other men, he proceeded on his way home. When he had gone a short distance, he was joined by a man named M'Cormack, who struck him a blow on the eye with a stick or "morgan rattler" without the least provocation. The prisoner Hay then joined M'Cormack, and kept hold of the prosecutor's hands while the other robbed him of his watch and 15*s.* in silver. M'Cormack had absconded.

Inspector Rogers, by whom the prisoner was apprehended, stated that from information he received he went to the house of the Rev. John Kelly, a Roman Catholic priest, from whom he received a watch, which the prosecutor identified as his property, and who was now called.

The crier of the Court was about to administer the oath to him, when he objected to the form of the oath.

HIS LORDSHIP.—What is the objection?

The Rev. Mr. Kelly.—Not that I shall tell the truth, and nothing but the truth; but, as a minister of the Catholic Church, I object to the part that states that I shall tell the *whole* truth.

HIS LORDSHIP said, the meaning of the oath is this: it is the whole truth touching the trial which you are asked; which you, legitimately according to law, can be asked. If anything is asked of you in the witness-box which the law says ought not to be asked—for instance, if you are asked a question the answer to which might criminate yourself—you would be entitled to say, "I object to answer that question, because the answer might criminate myself," and the law would sustain the objection. You can therefore have no objection as a loyal subject, and in duty to the laws of the country, to answer the whole truth touching the case which may be lawfully asked(*a*). Therefore you must be *sworn*.

(*a*) *Boyle* v. *Wiseman*, 24 L. J., Exch. 160.

1860.

REGINA v. HAY.

The witness took the oath in the usual form, and gave the following evidence:—I have been twelve years Catholic priest at the Felling. On Christmas-day I received the watch produced.

Headlam then asked, from whom did you receive that watch?

Witness.—I received it in connexion with the confessional.

HIS LORDSHIP.—You are not asked at present to disclose anything stated to you in the confessional (*a*); you

(*a*) It has been erroneously supposed that the learned Judge denied that any privilege attached to confession; but, as will be seen, he did not deny it; on the contrary, impliedly admitted it, and drew a distinction which would otherwise have been futile. That there is such a privilege can scarcely be denied. As a learned writer truly observes: "There cannot be a doubt that, previous to the Reformation, statements made to a priest under the seal of confession were privileged, except, perhaps, when the matter thus communicated amounted to high treason." (Best on Presumptive Evidence, p. 596.) The learned writer, in support of the exception suggests, cited from the "Ancient Laws and Institutes of England," a passage from the "Laws of Henry I.;" a comparison of which with the Saxon law in the same work (to which Lord Coke alludes as the sources of our common law) will show that the recognition was of Saxon, and the exception of Norman origin. The sanctity of confession, with that exception, has been recognized; as in the 9th Edw. II., c. 10:—

"Placet etiam Domino Regi, ut latrones, vel (?) appellatores, quandocunque voluerint, possint sacerdotibus sua facinora confiteri, sed caveant confessores, ne erronice hujusmodi appellatores informent."

Hereon Lord Coke comments thus:—

"¶ Latrones vel appellatores. This branch extendeth only to thieves and approvers indited of felony, but extendeth not to high treasons; for if high treason be discovered to the confessor, he ought to discover it, for the danger that thereupon dependeth to the King and the whole Realme; therefore this branch declareth the common law, that the priviledge of confession extendeth only to felonies: so this branch beginneth with thieves, extendeth only to approvers of thievery or felony, and not to appeales of treason."

Now, here it is clearly recognized by Coke that there was such a privilege; and neither in Randolph's case nor Garnet's does it appear that the communication was in sacramental confession; and so under the seal of confession. On

are asked a simple fact—from whom did you receive that watch which you gave to the policeman?

the contrary in Garnet's case, Lord Coke gave six reasons why the communication should not be deemed sacred; not one of which involved a denial of the privilege, but all of which implied its existence—the main reason being, that the communication was *not* in confession—the distinction taken by HILL, J., in the above case. The authority of Lord Coke, therefore, is clear that there was such a privilege at common law; and that such privilege continued after the separation from Rome, and after the alteration of religion. There had been no statute to take it away; and, on the contrary, the Prayer Book, sanctioned by statute, contained services in which (*vide* the Ordination Service) the clergy received power to give absolution, and (*vide* the Visitation of the Sick) were expressly directed, in certain cases, to administer it. The cases in which they were so directed were just those in which alone it is obligatory, as members of the Roman Catholic Church, to confess (*i. e.*, grievous or weighty sins); and the form of absolution (*ego te absolvo, &c.*) is precisely that used by Roman Catholic priests, *i. e.*, judicial or sacramental; and not declaratory merely, as in the Morning and Evening Services. (*Vide*, as to this distinction, Wheatley or Shepherd on the Book of Common Prayer.) And though it is a common idea that the Church of England denies that confession is a sacrament, that is an error; for the answer in the Catechism as to the number of the Sacraments, "Two only generally necessary to salvation," does not amount to a statement that there are only two sacraments; nor even that only two are ever necessary for salvation, but that only two are generally so. And it has been held that, according to our law, marriage is a sacrament (*Richards* v. *Dovey*, Willes Rep. 622), and it seems, from some decisions, to follow that confirmation is so. Even the Roman Catholic Church does not consider all the seven sacraments she holds necessary to salvation. For instance, extreme unction is not. This has been regularly proved in our Courts in criminal cases, and acted upon (*Regina* v. *Howell*, 1 C. & K. 689). It follows, then, that not only was there nothing in the change which took place at the Reformation to alter the case as to the privilege attaching to confession, but that there was, on the contrary, an express recognition of it by statute. For of course the recognition of confession implies, in the absence of anything to the contrary, the recognition of its secresy, because such was the common law rule; and if it were otherwise, no one would be likely to confess, and therefore the directions to the Anglican clergy, to exhort their penitents to confess, would be idle and futile. It follows, also, that the clergy of the Established Church would be within the privilege in cases in which, acting according to the rubric of the Service for the Visitation of the

1860.

REGINA v. HAY.

Witness.—The reply to that question would implicate the person who gave me the watch, therefore I cannot answer it (*a*). If I answered it, my suspension for life would be a necessary consequence. I should be violating the laws of the Church, as well as the natural laws (*b*).

Sick, and with a view to the giving of a judicial or sacramental absolution, they have received confessions. But it is not so clear that otherwise they would be entitled to the privilege, or that ministers of any other religious body, not believing in sacramental confession, would be entitled to it; at all events, according to the strict common law rule upon the subject, which, according to the clearest authority, applied only to sacramental confession with a view to sacramental absolution. But the later cases on the subject seem to extend the privilege to any communications made to a spiritual adviser as such, whether or not in sacramental confession; *R.* v. *Griffin*, 6 Cox, Crown Cases, 219.

(*a*) The distinction taken by the learned Judge was no doubt quite sound as regarded the legal privilege or protection attached to confession (for the matter was *out* of confession); although the obligation on the priest might possibly include anything which might indirectly tend to disclose what had been divulged *in* confession.

(*b*) The authorities of the Roman Church define the obligation thus:—"De sigillo Confessionis. Quæst. 1. Quæ, & quanta sit obligatio sigilli Sacramentalis? Respond. Est omnino gravissima. Ita ut nec ad vitandam mortem liceat unquam Sacerdoti aliquid *in Confessione auditum revelare;* nec in hoc admittitur parvitas materiæ, ut D.D. animadvertunt. Oritur autem hæc obligatio tum ex jure naturæ, tum Ecclesiastico." * * * * "Sigillum hoc est obligatio juris divini strictissima in omni casu, etiam quo integri regni salus periclitaretur, ad tacendum, etiam post mortem pœnitentis, *dicta* in *Confessione* (id est *in ordine ad absolutionem sacramentalem*) omnia, quorum revelatio sacramentum redderet onerosum, vel odiosum." But the obligation on the priest is one thing, the protection or privilege to be extended to him is quite another thing; a distinction which was not attended to in the comments which were made upon the case. And the privilege could not extend to anything said or done by the penitent *after*, and *out of*, even although in consequence of, confession. On the contrary, it might much more be said to have been, or at least might have been, in contravention of the spirit and object of the institution of confession; for, by the law of the Roman Catholic Church, satisfaction is an essential part of the Sacrament, and readiness to make it is a condition precedent to absolution. And satisfaction in some cases—as stealing—may, in some cases must, involve public or open confession; as, for instance, in the case of anonymous

HIS LORDSHIP.—I have already told you plainly I cannot enter into this question. All I can say is, you are bound to answer, "From whom did you receive that watch?" On the ground I have stated to you, you are not asked to disclose anything that a penitent may have said

slander; for it involves more than restitution—it involves reparation to any one directly or indirectly injured. And where there has been, as in the above case, a theft, and the guilt may be left doubtful by secret restitution, so that an innocent man may be convicted, satisfaction involves an open restitution, or at least, in some way, the disclosure of the name of the guilty party. Otherwise a murderer might obtain absolution while allowing an innocent man to be hanged for his own crime. In other words, he might obtain pardon for one murder while in the act of committing, or causing, another and a worse murder. This being so, the priest, in such a case, is bound to exhort to open restitution; and lending himself, by some act of his, out of confession, to assist the penitent in keeping his crime secret, may be in utter contravention and cannot possibly be in pursuance of the purpose and spirit of confession; and so cannot possibly be within the privilege attaching to it. Nor does it at all affect this argument that the priest is still bound to secresy, for he cannot get rid of his obligation by a wrongful act, which nevertheless deprives him of his privilege. It is apprehended, therefore, that the decision of the learned Judge, and the reason and distinction on which it was founded, were equally right; and this plainly appears from a number of cases on other kinds of privilege, which have proceeded on the same principle. Thus, counsel can be called upon to disclose matter that has come to their knowledge since they were counsel, and of their own knowledge, *Spark* v. *Middleton*, 1 Keb. 505; *S. P. Cuts* v. *Pubeny*, Vent. 197. The privilege in counsel, &c., is confined to cases where they are acting in their respective capacities, *Wilson* v. *Rastal*, 4 Term Rep. 753, and does not apply to a mere *gratis dictum*, *Cobden* v. *Kenrick*, *ibid.* 432; as in the above case, where the act of the priest was not in his capacity as such; for any other person might have restored the watch, and he was not at all bound to do so; on the contrary (as already shown) he might be acting contrary to his duty in so doing.

The decision was in conformity with many recent cases.

An attorney is bound to discover when, and to whom, he parted with documents of his client, *Banner* v. *Jackson*, 1 De G. & S. 472; *S. P. Shore* v. *Bedford*, 5 M. & Gr. 271; and so where a prisoner had given a will he had forged to his attorney not for a professional purpose; *Regina* v. *Jones*, 1 Denman's Crown Cases, 166; *Gillard* v. *Bates*, 6 M. & W. 547.

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to you in the confessional (*a*). That you are not asked to disclose; but you are asked to disclose from whom you received stolen property on the 25th of December last (*b*). Do you answer it, or do you not?

Witness.—I really cannot, my lord.

HIS LORDSHIP.—Then I adjudge you to be guilty of contempt of Court, and order you to be committed to gaol. [To the officer of the Court]—Take him into custody.

The witness was accordingly removed in custody.

Other witnesses were called.

Verdict, guilty.

(*a*) There, again, is an implied recognition of the privilege, *vide supra*, note (*a*), p. 6.

(*b*) Which, clearly, the witness was not by law privileged from answering (though no doubt he was bound not to answer according to the law of his Church); for it was a question not as to anything said in confession, but as to something done by and between the prisoner and the witness *after* and *out of* confession, and so not within the privilege, attaching only to sacramental confession.

W. F. F.

Liverpool, coram Hill, J.

REGINA *v.* JOHN MILNES.

Summer Assizes.

Where perjury is assigned upon a written instrument, subsequently lost, secondary evidence is admissible.

PERJURY was assigned to have been committed by the defendant at the Manchester District Court of Bankruptcy.

Leresche (*Hopwood* with him) stated the alleged perjury to be contained in an affidavit or deposition sworn by defendant in the usual form at a meeting for proof of debts against a bankrupt's estate. After being sworn by defendant the proof was placed on the file of proceedings in the Court, which file, (according to the practice,) each creditor, having proved his debt, was entitled to inspect. On this file it remained for several months, and various office copies, under the seal of the Court, were from time

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to time obtained for the purposes of a litigation which arose in connection with the estate. In the month of May, 1859, defendant demanded inspection of the file. His proof of debt appearing thereon, the file was handed to him by the usher, and shortly afterwards returned by defendant to that officer, who restored it to the customary place of deposit without examination. No examination was, indeed, again made of the file until the month of December, when this prosecution was instituted. The affidavit had then disappeared from the file, and all searches for it had proved ineffectual. Hence the original could not be produced before the jury, but one of the office copies, under seal previously mentioned, would be tendered in evidence.

Overend, Q.C. (*Holker* with him), objected that a copy could not be received in evidence, under any circumstances, on a trial for perjury. The law was clearly laid down in Taylor on Evidence (§ 1379, page 1232, 3rd ed. 1858). The learned author there, after describing the different means of proof of records, says:—"One or other of these copies will always be admissible in lieu of the original record, *excepting in two cases;* first, if issue has been joined on a plea of replication of *nul tiel record*, in some cause in a Court to which the disputed record belongs; and, secondly, *if a person is indicted for perjury in any affidavit, deposition or answer;* or for forgery with respect to any record. In either of these cases *the original document must be actually produced.*" Now, upon the opening of counsel, it was admitted this could not be done. A notice to produce had been served on defendant; but the facts stated as to defendant's opportunities of access to the file did not trace the missing deposition to his possession, without which the notice was unavailable. An additional objection to the admissibility of any secondary evidence arose on the mode of proof. In perjury alleged to be contained in any written instrument it must be shown that the name subscribed to the affidavit, &c. is of the hand-

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writing of the deponent (*a*). This is impracticable by means of a copy. Accordingly, in Taylor on Evidence (*b*), it is laid down, on the authority of numerous cases there cited, that "on a trial, too, for perjury, the signatures of the defendant and of the person whose name is attached to the jurat, must be proved." Hence he submitted that, as nothing short of the original document could be received in evidence, the prosecutor was out of Court, and the case could not be carried further.

Leresche, in reply.—It is submitted the proposition of the learned text writer is too broadly stated, and not borne out by the cases cited. In anticipation of this objection those authorities (*c*) have been examined and are distinguishable. In each instance the document was shown to be in existence, and within the reach of the prosecution. Though there was no direct authority against the statement in Taylor as to perjury, yet the corresponding proposition as to forgery cannot be reconciled with *Rex* v. *Hunter* (*d*). The true principle governing the case is there pointed out. There PARK, J., told the grand jury that, where the instrument alleged to be forged, either from its being in the possession of the prisoner, *or for any other sufficient cause*, cannot be produced, they might receive secondary evidence of its contents. In *R.* v. *Chadwick* (*e*), where goods were obtained by means of a false letter, which was lost between the committal and the trial, parol evidence of the contents was allowed. Perhaps the prosecution, on the reason

(*a*) Welsby's Archbold, 682, 15th edit.

(*b*) *Ubi supra.*

(*c*) B. N. P. 239; *R.* v. *Morris*, 2 Burr. 1189; *R.* v. *Benson*, 2 Camp. 508; *R.* v. *Spencer*, Ry. & M. 297; *Crook* v. *Dowling*, 3 Doug. 77; *Stratford* v. *Greene*, 2 Ball & Beat. 296; *Garvin* v. *Carroll*, 10 Ir. Law R. 330, *per* CROMPTON, J.; *Lady Dartmouth* v. *Roberts*, 16 East, 340, *per* Lord Ellenborough and Le Blanc, J. In this last case the Judges intimated an opinion that the same strictness was necessary in actions for malicious prosecution; but this would seem to be a mistake. See B. N. P. 13; *Purcell* v. *M'Namara*, 1 Camp. 200.

(*d*) 3 C. & P. 591.

(*e*) 4 C. & P. 181.

alleged by the defendant's counsel, could not rely much on the notice to produce; but, as the non-production of the original was under the circumstances reasonably accounted for, he urged that secondary evidence could be given of it as a lost instrument.

Overend (in reply to HILL, J.) said he had not an authority directly in point. He relied upon the text-book.

HILL, J.—As it is admitted on both sides that there is no case expressly in point, I must decide the case upon principle. Assume a case of this kind: a man has sworn before the Bankruptcy Court an affidavit which has been placed upon the file. The falsehood of the statements in that affidavit have been discovered; the party has been examined before a magistrate and committed by him to the assizes; the case is ripe for trial; and a *subpœna duces tecum* has been served upon the officer who has the custody of the records of the Bankruptcy Court. On the evening before the trial, a fire takes place in the building where the Court sits, and where its records are preserved, and the latter are destroyed. In such case could it be contended that an office copy of the affidavit on which the perjury is assigned could not be received, and that, because by the act of God or of man the original evidence had been destroyed, the person charged with so pernicious an offence as perjury must escape scot free? I, for one, cannot consider such a proposition to be law. With all respect for the learned text writer who has been quoted, I shall hold that secondary evidence is admissible, upon a proper foundation being laid. Upon proof that the original has been lost or destroyed, I shall permit evidence to be given of an office copy (*a*).

Overend asked for a case to be reserved for the Court of Criminal Appeal.

(*a*) Secondary evidence admissible in an *action* for libel. *Boyle* v. *Wiseman*, 24 L. J., Exch. 284. And *semble*, on an *indictment*.

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HILL, J.—I will consider the application, if it be necessary so to do, at the close of the case.

The file of proceedings on which the affidavit had been placed was then produced, when, it not being found thereon, evidence was given that all the places in which the proceedings of the Manchester District Court of Bankruptcy were usually kept had been carefully searched without success for the missing document. Secondary evidence, by means of an office copy, was then offered and received by the learned Judge.

The prisoner was acquitted upon the merits.

MIDLAND CIRCUIT.

Derby, coram Willes, J.

REGINA *v.* HENRY GODDEN GARRETT.

Spring Assizes.

A bailment under the Fraudulent Trustees Act, 20 & 21 Vict. c. 54, means one where the same property is to be returned, and not one in which different property is to be returned.

THE prisoner was indicted under sect. 4 of 20 & 21 Vict. c. 54, for that he, being a bailee of certain monies, the property of George Butt, did fraudulently take and convert the same to his own use.

There were three other counts varying the charge.

Boden for the prosecution.

Stephen defended the prisoner.

It appeared from the evidence of the Rev. George Butt, Vicar of Chesterfield, that, at the time of committing the offence charged, the prisoner was his curate. There was a district branch of the Church Missionary Society established in Chesterfield, and in May, 1859, a collection was made at the parish church on behalf of that Society. A sum of 18*l.* 3*s.* 9*d.* was collected on that occasion, and paid by the witness to his account with his bankers. Early in the following December, the prisoner proposed to witness that the money should be put into the savings bank

to make interest until March, at which time it would, in the usual course, be paid over to the parent Society in London. Witness consented to let the prisoner have the money for that purpose, and drew a cheque upon his bankers for 18*l.* 3*s.* 9*d.*, which he gave to the prisoner. At the time when he gave this cheque to the prisoner, witness was aware that the prisoner had in his possession other monies, which had been collected in other ways for the same Society. In January following the witness, learning that the prisoner was involved in pecuniary difficulties, applied to him to repay this money. Prisoner replied that he could not pay it, as the money was in the savings bank, and a week's notice must be given before it could be withdrawn. He added, "If you want the money, I can give it you; for I have money in the house. But you may be satisfied; it is here;" and he held up a book containing the following entry: "Received from the Rev. George Butt, 18*l.* 3*s.* 9*d.*" Witness said, "Then the money is paid in in my name?" The prisoner replied, "No; it is paid in in my name, but as from you." Subsequently, on applying at the savings bank, the witness was informed that the money had never been paid in. Witness never recovered the money, and afterwards paid the 18*l.* 3*s.* 9*d.* to the Society out of his own pocket. Some two or three week after this transaction, and before the charge was made, witness was offered money by a Mr. Grattan, the prisoner's solicitor, who said he had instructions to pay the prisoner's debts.

On cross-examination it appeared that, with regard to the other sums collected for the Society, which the prisoner had in his hands, it would be his duty to pay them directly to the Society. Witness never gave the prisoner directions to return the money to him, in order that he (witness) might pay it over to the Society. The prisoner had not been appointed treasurer to the branch Society in Chesterfield, but acted as such.

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WILLES, J.—On what count of the indictment are you proceeding after this answer, Mr. Boden?

Boden contended that the money was handed over to the prisoner for a particular purpose, viz., that of paying it into the savings bank.

WILLES, J.—I have the Act under my eye, and I have an opinion that the prisoner was not a bailee within it. It seems to me that the bailment referred to in the statute is one in which the same property is to be returned, not one in which different property is to be returned. It is clearly not larceny; for the property, as well as the possession, was parted with. I am clearly of opinion that no criminal charge can be sustained here, and that the prisoner is only civilly responsible. I have had the opportunity of considering the statute lately on the Oxford Circuit in conjunction with my brother BYLES. The prisoner was acting as treasurer, and the money was placed in his hands as such, for the purpose, first, of putting it into the savings bank until March, and subsequently of paying it over to the parent Society. I very much regret that, when an offer to pay the money was made before the charge, that offer was not accepted, and that a criminal charge, founded upon an ambiguous statute, was preferred against the prisoner (*a*).

(*a*) See *ante*, Vol. I. p. 109.

Leicester, coram Pollock, C. B.

REGINA *v.* HULL.

Spring Assizes.

The issuing of a warrant of apprehension is not a "commencement of proceedings" within 9 Geo. 4, c. 69, s. 4.

THE defendant was indicted for being, in company with two others, by night, on certain land, armed for the purpose of taking game.

Leigh for the prosecution.

O'Brien conducted the defence.

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The offence was committed some time in 1853, and a warrant for the defendant's apprehension was granted at that time, but not served, the defendant having absconded. Subsequently, on the defendant's return after six years' absence, the present proceedings were instituted.

Leigh, for the purpose of showing that the prosecution had been commenced within twelve months after the commission of the offence (*a*), tendered the warrant for the defendant's apprehension, which was issued within a week after the commission of the offence charged, but never served for the reason stated above.

POLLOCK, C. B.—I doubt whether this is a commencement of proceedings within the statute. Ordinarily there is no limitation of suits in criminal matters, conformably to the maxim, "Nullum tempus occurrit regi." Consequently, the only effect of lapse of time is to raise doubts as to the prisoner's identity. In offences, however, punishable upon indictment, under the stat. 9 Geo. 4, c. 69, s. 4, the prosecution must be commenced within twelve calendar months after the commission of the offence. Can you cite any cases to show that this is a commencement of proceedings, Mr. Leigh?

Leigh cited *R.* v. *Willan* (*b*), *R.* v. *Austin* (*c*), *R.* v. *Brooks* (*d*), *R.* v. *Phillips* (*e*).

POLLOCK, C. B.—None of those cases go to the extent contended for in this case. I am of opinion that the issuing of this warrant was not a commencement of proceedings within the statute.

The jury was accordingly directed to acquit the prisoner.

(*a*) See 9 Geo. 4, c. 69, s. 4.
(*b*) 1 East, P. C. 186.
(*c*) 1 C. & K. 621.
(*d*) 1 Denison, C. C. R. 217.
(*e*) R. & R. C. C. 369.

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Northampton, coram Pollock, C. B.

REGINA *v.* MOBBS.

Spring Assizes.

On an indictment for bribery, the trial was, on the application of the prosecutor, postponed to the next Assizes, on account of the absence of material evidence.

THE defendant was indicted for bribery at the last election of members for the Borough of Northampton.

The charge was preferred some time in April last, and the defendant was committed for trial, but held to bail on the 19th of July following.

Mellor, Q.C., for the prosecution, applied to have the trial postponed to the next Assizes, on an affidavit that the register of voters for the borough was necessary to complete the case for the prosecution; that the said register was in the possession of Mr. Jeffries, town clerk of Northampton; that inquiry had been made the day before for Mr. Jeffries, to serve him with a subpœna to produce the register at the trial; that Mr. Jeffries could not be found on inquiring after him at his office and house; that his clerk at his office had said, in answer to inquiries, that Mr. Jeffries was not in Northampton, that he (the clerk) did not know where Mr. Jeffries had gone, or when he would return, and that he (the clerk) could not produce the register as Mr. Jeffries kept it under lock and key.

Macaulay, Q.C., for the defendant, opposed the application, on the ground that the defendant, having been committed for trial in July last, the evidence for the prosecution should have been prepared long before, and not delayed till the last moment; that, if the register was necessary to complete the case for the prosecution, it should have been laid before the grand jury; and that, as it had not been laid before them, and the grand jury had nevertheless found the bill, it must be inferred that the register was not necessary. The case for the prosecution might have been completed in time for the last Summer Assizes, had the parties who conducted the prosecution so chosen, and as they had not chosen to do so, the defendant ought

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not to be kept in suspense, and have this trial hanging over him any longer.

Mellor, in reply.—The register is a public document, to which all the voters for the borough have a right of access, and the prosecution was justified in supposing that it would be forthcoming whenever it was required.

POLLOCK, C. B.—The bill was only found yesterday by the grand jury, and in these cases the finding of the bill is analogous to the joinder of issue in a civil cause. No civil cause can be tried without eight days' notice, and if the counsel for the defence had applied to have the trial postponed I should have granted the application, without requiring any affidavit, merely on the ground that the bill had only been found the day before. In this case the application is made by the counsel for the prosecution, but in my opinion sufficient ground for it has been shown. It is not necessary that the case for the prosecution should be completed previously to going before the grand jury; it is enough if a case of suspicion can be shown. To require all the evidence to be produced before the grand jury would, in many cases, put the prosecution to a very needless expense. The trial must be postponed till the next Assizes, and the defendant discharged on his own recognizances.

Application granted.

Derby, coram Willes, J.

REGINA *v.* MARY ANN WARD.

Spring Assizes.

A count for stealing certain articles may not be joined with a count for receiving those and other articles knowing them to have been stolen.

THE prisoner was indicted for stealing three collars, one gold chain and locket, and one thimble-case, the property of Catherine Else. There was a second count, charging the prisoner with receiving the said articles, knowing them to have been stolen.

Stephen for the prosecution.

O'Brien defended the prisoner.

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The prosecutrix proved that she missed the jewellery from her bed-room a week before the prisoner had entered her father's service, and the collars afterwards, and whilst the prisoner was in her father's service.

O'Brien objected. It appears by this witness that there is no evidence of stealing the jewellery, and that the case, as regards that portion of it, must be one of receiving only, while, as to the collars, there is evidence for the jury of stealing. It follows, therefore, that in truth a count for stealing the collars is joined with a count for receiving the jewellery, knowing it to have been stolen. It is submitted that these counts cannot be joined together. By statute (*a*), a count for stealing may be joined with a count for receiving the same goods, but it has never been decided that a count for stealing may be joined with a count for receiving different goods.

Stephen referred to 14 & 15 Vict. c. 100, s. 17, as to election.

O'Brien.—That relates to charges of larceny only.

WILLES, J.—That is so. This is an important point with reference to future practice, and I will consult the Chief Baron upon it. His Lordship did so, and upon his return observed, I think it will be more satisfactory, Mr. Stephen, that you should only proceed upon one of these charges. This is not to be taken as a final decision. When I get back to London I shall consult the other Judges upon the point; but it is not of sufficient importance to reserve a case upon.

Stephen elected to proceed upon the charge of receiving the jewellery, knowing it to have been stolen.

The prisoner was acquitted.

(*a*) 11 & 12 Vict. c. 46, s. 3.

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Lincoln, coram Willes, J.

REGINA *v.* PEEL.

Spring Assizes.

A dying declaration is admissible, if the declarant conceives himself to be past recovery, although the surgeon attending him may believe him to be progressing favourably.

A witness cannot be cross-examined as to his statements made before the committing magistrate, until his depositions have been read over to him; such questions may however be put by the Court personally, and by the prisoner's counsel, as the mouthpiece of the Court, by its permission.

THE prisoner was indicted for the manslaughter of Mark Brewer.

Stephen and *Huish* prosecuted.

Macaulay, Q.C., and *O'Brien* defended the prisoner.

Stephen, in opening the case, was proceeding to state to the jury declarations made by the deceased when on his death-bed, and at a time when he believed that he should not recover.

Macaulay, Q.C., objected to the opening of these declarations, because, although the man believed himself to be past hope, yet at that time the surgeons who attended upon him were of opinion that his condition was not past hope of recovery.

Stephen contended that these declarations were admissible, the persuasion of the declarant himself as to his state being sufficient. He cited *Seton's Case* (*a*).

Macaulay.—In that case the surgeons had told Mr. Seton that he must give up all hope.

WILLES, J.—At present I am inclined to think that the declarations are admissible, unless the surgeons should give very different evidence to that in their depositions, which I now have before me. Should the occasion arise, I will reserve a case for you, Mr. Macaulay; but upon a recent occasion at Derby, when I reserved a case (*b*), the Judges of the Court for Crown Cases Reserved, although they agreed with me, thought it was a question of fact only, which I might have decided for myself. Subsequently a medical witness was called, who deposed that at the time the declarations were made he considered the disease to be

(*a*) *Reg.* v. *Pym*, Law Times for March 21, 1846.

(*b*) Probably *Reg.* v. *Reaney*, Dears. & Bell, C. C. 151.

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progressing favourably, and that there were fair hopes of the deceased's recovery.

Macaulay upon that objected to the admissibility of the declarations. A dying declaration must be made upon a belief of impending death, and that belief must be well founded. It is not sufficient that there is a bonâ fide belief, which is afterwards verified by a death within a short time afterwards, if, at the time of making the declaration, the surgeons are attending upon and treating the man as a recovering patient. A mere impression of impending death is not sufficient; such a feeling may change every five minutes.

Stephen referred to *Moseley's Case* (*a*) as in point.

WILLES, J.—It must be proved that the man was dying, and there must be a settled, hopeless expectation of death in the declarant. There does appear to have been such an expectation in this case, and I shall therefore admit the declarations. They were accordingly put in and read (*b*).

In the course of the case *Macaulay* proposed to question a witness as to statements made by him before the committing magistrates, and which statements were contained in the depositions taken on that occasion.

Stephen objected that the questions could not be put without first reading over his deposition to the witness.

Macaulay.—My friend, I presume, refers to the *Queen's Case* (*c*); but that, I apprehend, has been overruled by Act of Parliament.

WILLES, J.—No. It has been decided that such a question cannot be put without reading over his deposition to the witness (*d*).

(*a*) 2 Russell on Crimes, 757, reported Moody, C. C. R. 97.

(*b*) See *Reg.* v. *Reaney*, Dears. & Bell, C. C. 151, and *Reg.* v. *Whitworth*, 1 Fost. & Fin. 382.

(*c*) 2 Brod. & Bing. 286.

(*d*) Referring probably to *Reg.* v. *Taylor*, 8 C. & P. 726.

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Subsequently, on *Macaulay's* proposing to adopt the same course with regard to another witness, *Stephen* again objected.

WILLES, J.—From the depositions, which I have before me, I am of opinion that the question is a proper one to be put to this witness under the circumstances, and, although Mr. Macaulay cannot put the question without reading his deposition to the witness, the Court can do so (*a*). Mr. Macaulay will therefore be allowed to put these questions, as the mouthpiece of the Court, without first reading the depositions.

Stephen did not claim to reply (*a*).

The prisoner was acquitted.

(*a*) See *Reg.* v. *Edwards*, 8 C. & P. 26.

Northampton, coram Willes, J.

GILFORD *v.* DAVIS.

Spring Assizes.

ACTION on a warrant.

Plea: denying the breach.

Mellor and *O'Brien* for the plaintiff.

Hayes, Serjt., and *Field* for the defendant.

Evidence was called on both sides.

Hayes, Serjt., was about to sum up for the defendant, when

The defendant's counsel, in addressing the Court a second time, after calling evidence, has only a right to sum up that evidence, on his own side, and not to comment generally on the case.

WILLES, J., said:—The right of counsel to sum up is restricted to commenting upon the defendant's evidence, and does not permit him to address the jury generally upon the case. My brother MARTIN has expressed the like opinion, which is also that of a majority of the Judges; but the question has never been made the subject of any decision, and, should you desire to raise it, it shall be reserved.

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Hayes, Serjt., expressed his acquiescence, however, in the opinion of his Lordship, and summed up the evidence for the defendant.

Upon the principle so laid down the jury could not agree and were discharged.

Nottingham, coram Pollock, C. B.

CRESSWELL *v.* JACKSON.

Spring Assizes.

In cross-examination of an attesting witness to a codicil, he denying that it was in his handwriting; other documents admitted by him to be in his writing were allowed to be submitted to the jury for the purpose of comparison of handwriting, under sect. 27 of the C. L. P. Act of 1854.

ISSUE out of Chancery to try the validity of certain codicils, set up by the plaintiff, and affecting the interest taken by the defendant, devisee under the will.

The issue had been tried at a former Assizes before ERLE, C. J.

Macaulay, *Mellor* and *Field* for the plaintiff.

Hayes, Serjt., *Flowers* and *O'Brien* for the defendant.

A witness who had attested one of the codicils was called on the part of the plaintiff to prove the execution of it by the testator.

In cross-examination he was asked whether the handwriting of the codicil was not his own, which he denied. Various other writings were then put into his hands, and having been admitted by him, it was proposed, on the part of the defendant, to lay them before the jury, for the purpose of comparison of handwriting, under the Common Law Procedure Act of 1854, s. 27 (*a*).

(*a*) Comparison of a disputed writing, with any writing proved to the satisfaction of the Judge to be genuine, shall be permitted to be made by witnesses; "and such writings, and the evidence of witnesses respecting the same, may be submitted to the Court and jury as evidence of the genuineness or otherwise of the writing in dispute." It is not expressed when the writings are to be submitted to the jury, and the comparison may be made; but it is implied that the writings, and the evidence of witnesses, are to be submitted to them at the same time; and, if the other writings are produced in course of cross-examination of a witness, and they are the writings of the witness,

ERLE, C. J., had allowed this to be done; and now

POLLOCK, C. B. (*a*), took the same course, and permitted the documents to be shown to the jury before the cross-examination was proceeded with.

The case for the defendant was, that the codicils were forgeries, and written by the witness.

Verdict for the defendant.

the most convenient time will probably be then. In other cases, according to the ordinary rule, it will doubtless be in the discretion of the Judge.

There is no limitation imposed in the terms of the section itself. One restriction is implied, viz., that the disputed writing must be relevant to the issue; that being implied in all the prior sections on the subject, as it has been often held to be implied in all the rules of evidence as to contradiction or confirmation. See *Melhuish* v. *Collier*, 19 L. J., Q. B. 497; *Palmer* v. *Fraser*, 22 L. J., Exch. 32; or, as to the production of evidence, see the recent case of *Beatson* v. *Skene*, 29 L. J., Exch. But, supposing the handwriting of the disputed document to be relevant, as here it plainly was, the case for the defendant being that the codicil was forged by the attesting witness, there is no restriction on the section as to whether the comparison of handwriting may be as to the handwriting of the witness, or of a party in the cause; and whether of the party setting up the document, or the party disputing it, in confirmation or in contradiction in course of cross-examination, or of examination of a witness, as "adverse" under sect. 22; as to which, *vide* Vol. I., pp. 254, 433, 505; and see *Birch* v. *Ridgway*, Vol. I., p. 270.

(*a*) *Ibid.*

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HOME CIRCUIT.

Hertford, coram Erle, C. J.

WAKELIN *v.* MORRIS.

Spring Assizes.

In an action of slander, where there is no real injury, the jury may find for nominal damages, and *semble*, may consider the question of costs. Thus, in an action by a master of a workhouse, for words imputing to himself that he dishonestly got honest men turned out of employment there, in order to get in creatures of his own, for his own purposes, held actionable; but, being spoken in angry altercation, and without malice, the jury were directed that they might, if they thought there was no real injury, give nominal damages, so as not to carry costs; and the defendant's counsel allowed to ask, on cross-examination, what would be the probable amount of costs to the defendant if a verdict for more than a nominal amount were given.

ACTION for slander upon the plaintiff in his office as master of the workhouse of St. Albans. The words laid were: "Now, Mr. Master, you have got fat upon the ratepayers, and are not an honest man. You are an undermining fellow. You get honest officers put out, to get in creatures of your own. I know it, and have not been overseer for nothing."

Innuendo, that the plaintiff acted dishonestly in his said office, &c.

Plea: not guilty.

Shee, Serjt., for the defendant, submitted that the words were not actionable; but

ERLE, C. J.—They are clearly so. They are closely connected with the plaintiff's office, and tended to lower him in the estimation of the ratepayers and guardians, and to bring his situation into jeopardy.

Hawkins, for the plaintiff, desired to prove words spoken by the defendant ten days *after* the slander complained of, as tending to show that the slander was spoken *maliciously*. The words now inquired of were, "I am going before the board as to that matter," which, it was suggested, meant the matter of the charges conveyed in the slander.

Shee, Serjt., objected; but

ERLE, C. J.—The words are so closely connected (if they have the meaning suggested) with the slander that they are admissible as evidence of malice (*a*).

(*a*) See *Darby* v. *Ouseley*, 25 L. J., Exch. 229.

The plaintiff's attorney being called to prove that the defendant had admitted the words, and that the plaintiff had delayed proceedings, in mercy to him, to afford time for an apology in the papers.

Shee, Serjt., cross-examined the witness as to what would be the probable cost to the defendant if the verdict went against him even for nominal damages.

Hawkins objected that this was irrelevant and immaterial.

Shee, Serjt., urged that it was relevant, because arising fairly out of the examination in chief, and that it was material on the question of damages.

ERLE, C. J.—I do not know on what ground I can exclude it, therefore I shall admit it (*a*).

(*a*) It is conceived that the idea that the jury ought not to be informed of the law as to costs is erroneous. So far from it, costs are a part of the damages, and are recoverable only as such; insomuch that, in the stat. 21 Jas. 1, c. 16, that if the damages in slander be under 40*s*., the plaintiff shall recover no more costs than damages. It has been held that the statute only restrains the Court from awarding more costs than damages; but the jury not being restrained thereby, may give what costs they please; *Brown* v. *Gibbons*, 1 Salk. 207; *Phillips* v. *Bacon*, 9 East, 304. And the very form of the *postea* shows that, in contemplation of law, the jury assess the costs as part of the damages. "The jurors aforesaid say upon their oath that the defendant is guilty, &c., and they assess the damages of the plaintiff over and above his costs and charges by him about his suit in this behalf expended to —*l*., and for those costs and charges 40*s*.;" the costs of increase being, for the sake of convenience, now actually assessed by the master; but in contemplation of law being given by the jury. And how can they say, in cases like that above, of merely nominal or trivial damage, whether they will assess the damages of the plaintiff on occasion of "the grievances, &c.," over and above his costs and charges, if they do not know whether he will have any "costs and charges" beyond what they assess? Supposing that if he will, they think that he ought not to have any damages "over and above his costs." Where the jury asked, in an action for libel, whether a shilling would carry costs, and being told that it would, returned a verdict for the defendant, the Court granted a new trial, on the ground that they had given

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Shee, Serjt., then elicited that the costs would probably exceed 100*l.*

It was also elicited that the slander was spoken in the course of an angry altercation at a public-house, and in

a verdict against the direction of the Judge—that they should find for the plaintiff in a case fit for substantial damages—and indulged themselves in doing that indirectly which they could not do directly; *i. e.*, deprive the plaintiff of his costs; *Levi* v. *Milne*, 4 Bingh. 201. But it was not intimated that the Judge had done wrong in telling the jury the law as to costs. And if the case had not been one for substantial damages, and the jury had found for the plaintiff, even for a farthing instead of a shilling, so as not to carry costs, there seems no reason to say that they would have been wrong; for the damages in libel are not capable of measurement, (where there is no special damage,) and may be affected by any considerations as to the conduct of either party, and among others, by the conduct of the plaintiff in trying to inflict on the defendant the costs of an action for an act which did no real injury. Where, on the execution of a writ of inquiry, in an action for slander, the jury were incorrectly told by the under-sheriff that any amount of damages would carry costs, and they found for less than forty shillings, that was held no ground for granting a new trial, nor even for increasing the amount of the verdict; *Graten* v. *Collard*, 6 Dowl. P. C. 503. And so where, without such information, they gave a similar verdict, although the plaintiff thereby lost his costs; *Rendall* v. *Hayward*, 5 B. N. C. 424. But where in a case for substantial damages the jury gave a farthing, the Court granted a new trial; *Armitage* v. *Hales*, 4 Q. B. 917; supported and followed in *Wilson* v. *Hicks*, 26 L. J., Exch. 244 (where see a note of the reporter). And so, where it appears that the jury have taken a wrong way of arriving at a verdict, as, splitting the difference in a case of liquidated demand; *Hall* v. *Poyser*, 13 M. & W. 600. But where the jury had given 5*l.* in an assault, under the idea that it would carry costs, and, on finding that it did not, wanted to give more, the Court refused to grant the plaintiff a new trial; for, *per* BRAMWELL, B., they had no right to give a verdict with reference to anything else than the injury sustained by the plaintiff. And there they wanted to give or to increase substantial damages merely to carry costs, which would have frustrated the statutes as to costs; *Kilmore* v. *Abdoolah*, 27 L. J., Ex. 306. But there POLLOCK, C. B., said: "There is no reason why they should not be informed of the law as to costs if they ask it as part of the law." And this, it is conceived, is the true view: that the jury are entitled to know the rule as to costs, to enable them to judge whether they will give any damages beyond the costs, in cases where there has been no real damage.

answer to some sarcasms upon the defendant which had caused great irritation. And that the defendant had been ready to retract in writing the imputations suggested, but not to print a retractation in the papers.

ERLE, C. J.—There are two parts of the words complained of which, in my opinion, are actionable, if you believe they were spoken in the sense imputed: those supposed to impute that the plaintiff got honest officers dismissed to serve his own purposes, and those that he was dishonest in his office. If you do not believe that they were really spoken so as to convey those imputations, find for the defendant.

But if you believe they were so understood, as reflecting on the plaintiff as master of the workhouse, find for the plaintiff.

As to the amount of damages, that greatly depends upon the way in which the words were spoken, whether seriously or angrily in mere retaliation and irritation, and partly under the excitement of drink. Words spoken in that way would not be likely to cause so much injury as they otherwise might have done. And then there was the defendant's consent to retractation, even in writing. There was no just ground for demanding an apology in the newspapers for words merely spoken at a public-house. If you believe that the plaintiff really was required to bring this action to vindicate his character, then you may think it proper to give substantial damages which will carry costs. But if you think that it was not so, and that the words did no real injury, you can find nominal damages, which will not carry costs.

The jury asked what sum would carry costs.

ERLE, C. J.—I am not aware that there is anything to preclude my telling you (*a*), but the liability to costs depends upon various statutory enactments which it is not

(*a*) *Kilmore* v. *Abdoolah*, 27 L. J., Exch. 307.

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easy always to carry accurately in mind, and the answer might mislead you (*a*).

Verdict for the plaintiff, damages 1*s*. (*a*)

(*a*) A verdict in tort for not above 5*l*., without certificate, would not carry costs in trespass, *Norwood* v. *Pitt*, 28 L. J., Exch. 212; but in slander no certificate can be given. So ruled per WILLIAMS, J., on the Norfolk Circuit. *Ex relatione* Keane.

STAVELY *v.* UZIELLI.

Spring Assizes.

Although, where a servant has once been held out by his master as having authority to pledge his credit, that authority cannot be withdrawn merely by orders to the servant, but there must be notice to the tradesman; yet, without express evidence of actual notice, there may be evidence from all the circumstances; as, lapse of time, the not sending in accounts, &c.; from which it may be inferred that the tradesman must have known that there was no such authority, and that he did not contract on the credit of the master.

ACTION for work and labour as farrier and veterinary surgeon.

Pleas: 1. Never indebted.

2. Payment.

The particulars claimed 66*l*. upon an account extending from October, 1852, to June, 1857; all the items (which were given with dates) being small, a few shillings at a time, and credit being given in February, 1852, for a payment on account of 4*l*. 9*s*.

The plaintiff's case consisted chiefly of the defendant's answers to interrogatories to the following effect:—That from 1846 to 1858 he had in his employ a groom named Cotterell, and that during the whole of that period he had horses under Cotterell's care. That the engaging of persons to shoe or attend to the horses was attended to by Cotterell, who had directions and money to pay *ready money* for whatever was done. That the instructions to Cotterell were not to procure anything upon credit, but to pay ready money, and that he was supplied with ready money according to that arrangement; and that the defendant never gave him *money* for any debt incurred on his, the defendant's, credit; but that, in 1851, *Cotterell handed him an account amounting to* 20*l*. 4*s*. 4*d*. *as due to the plaintiff, and that he, the defendant, paid that amount by cheque drawn in favour of the plaintiff*. That since then

he had not known who attended to his horses; and that he had received no account of the plaintiff's until July, 1858; the groom having died in *May* previous.

The plaintiff was called, and proved that upon the orders of Cotterell he had attended to the defendant's horses at Hornsey from January, 1847, to June, 1857, and had received payments always *through* Cotterell; in April, 1847; in January, 1848; in February, 1849; in January, 1850; in February, 1851 (the payment, by cheque, of 20*l.* 4*s.* 4*d.*); and in October, 1852. That he had sent in accounts annually; and had sent in similar accounts in 1853 and 1854, but not *after* that year, until the entire amount was sent in July, 1858.

There was some confusion about the payment of 4*l.* 9*s.* on account in October, 1852; the amount for that year being much more (the average annual amount being 10*l.* or 12*l.*), and there was no explanation of the absence of accounts for the last four years (except that for a great part of the period the defendant had been abroad), nor why the account had not been sent in or before the groom's death, nor until more than a year after the defendant's removal from Hornsey.

The defendant was called, and denied any authority to Cotterell to contract on credit; and declared that when he paid the amount in 1851 he had expressly forbidden him to do so, and that after that time he had settled with him monthly for all stable expenses, and produced some vouchers —suggested but not sworn to be the groom's—bearing out that statement. Some of them included items for farriery.

The defendant, however, could not say that he had ever cautioned the *plaintiff* not to continue to give credit; and

Finlason, for the plaintiff, cited and relied upon *Aste* v. *Montague* (*a*); but

ERLE, C. J. (to the jury).—The lapse of time makes a

(*a*) Vol. I. p. 264.

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difference in this case. And the question is, under these circumstances, whether you are satisfied that the plaintiff did the work on the credit of the defendant. Because, although the law as laid down in that case is clear, that the master who has once held out a servant as having authority to contract on credit must withdraw that authority by notice, not to the servant, but to the *tradesman*, and that it is not enough to do so by notice merely to the servant; yet there is much more than that in this case, and there may be notice by other means than by *express* or *actual* notice. And here you have the fact, that no accounts were sent in, even to the *servant* (and *none to the master*), for four years before the servant's death; and no account sent in until after his death and the plaintiff's removal. All these circumstances are material to the question, whether, in fact, the plaintiff did, after 1851, do the work upon the credit of the defendant; or whether, on other grounds, the plaintiff did not know that the servant had no authority to pledge his master's credit. The plaintiff must satisfy you that he did the work on the credit of the defendant; and if you think he did not, find for the defendant.

Verdict for the defendant (*a*).

Finlason for the plaintiff.

Hawkins and *Joyce* for the defendant.

(*a*) By a special jury, and (as one of the jurors told the reporter) chiefly by reason of the absence of any explanation as to the payment of so small a sum in 1852, on account.

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Maidstone, coram Erle, C. J.

BEARD *v.* WATSON.

Spring Assizes.

In an action of trespass, pleas: not possessed; and also a justification under a right of way all over the *locus in quo*; an order having been made at the last Assizes for a plan to be marked by the plaintiff so as to show the places at which the alleged trespasses were committed; and there having been no application for the plan on the part of defendant since notice of trial, an application on his behalf, to postpone the trial because of the non-delivery of the plan, was refused.

ACTION for pulling down the plaintiff's fence and trespassing on his land.

Pleas: 1. Not possessed.

2. Justification under a right of way all over the land, the fence being an obstruction thereto.

Issue, and new assignment *extra viam.*

The cause had come down for trial at the last Assizes before MARTIN, B., who had made an order that a plan should be marked on the part of the plaintiff with the places where the alleged trespasses were committed, and the cause was made a *remanet;* but there was no stay of proceedings.

Petersdorff, Serjt., now applied, on the part of the defendant, to postpone the trial, on an affidavit that the plan had not been marked, although applications had been made to the plaintiff's attorney for that purpose.

ERLE, C. J., allowed the plaintiff's attorney time (while another cause was taken) to answer the affidavit, although he thought it hardly necessary to do so, since there was no stay of proceedings (*a*), nor any application to a Judge to enforce delivery of the plan, so that the present application was apparently for delay.

Lush answered the application upon an affidavit of the plaintiff's attorney, that there had been no refusal to mark the plan, but only an intimation in August that there was no immediate necessity for so doing; that notice of trial had been given on the 1st March, but that there had been no application to have the plan marked; that particulars of trespasses had been given; that the defendant could not be ignorant of the places; that the dispute was, whether

(*a*) See Vol. I. p. 227.

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there was any right to go over the land either from the road or from any part of the premises.

ERLE, C. J.—If the land on which the fence is was not the plaintiff's, then there is an end of the case. If it is, then the defendant must prove a right of way such as to justify breaking down the fence and going all over the land (*a*). So that it does not appear how the marking the plan can be so material as that the defendant cannot go to trial without it; and if it were so, he should have applied for it before. If there were any real reason shown for refusing the plan I would postpone the trial, even now, until it was in some way supplied; but I see no reason, and therefore I shall try the cause.

Petersdorff, Serjt., declined to appear, and the cause was tried as undefended.

Verdict for the plaintiff.

(*a*) *Smith* v. *Royston*, 8 M. & W. 381; *Webber* v. *Sparks*, 10 M. & W. 458.

Maidstone, coram Erle, C. J., at Chambers.

MYERS *v.* BARRETT.

Spring Assizes.

In an action on a bill of exchange, a special plea allowed to be added, as substitution for others on the record, raising a substantial defence, not inconsistent with others allowed to remain.

ACTION on a bill of exchange dated 24th May, 1853.

Pleas: 1. Denying the acceptance.

2. (Except as to part) that the bill was accepted as a security for 75*l.*, and no consideration, save as to so much.

3. That the plaintiff, before action, exonerated and discharged defendant.

4. Payment.

Willoughby, for the defendant, applied to strike out the two first pleas, and to add this plea:—

"That prior to the 24th May, 1853, the defendant owed the plaintiff 175*l.*; and that, on payment, he gave his acceptance to the plaintiff with the date in blank (which was the bill sued upon). That prior to the 24th May, 1853, he

paid the same to the plaintiff; and that the plaintiff fraudulently filled up the blank with the date in the declaration mentioned; whereas, in truth and in fact, at that time there was nothing due and owing to the plaintiff from the defendant.

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ERLE, C. J., allowed the plea to be added.

Chelmsford, coram Wightman, J.

BRIDGER *v.* HUETT AND OTHERS.

Spring Assizes.

EJECTMENT for a copyhold tenement.

Copyhold rolls proved by a deputy steward, not signed by the steward, admitted in evidence, and a surrender out of Court proved by entry upon such rolls.

The admission of one Bedell, in 1812, was proved by an entry on the rolls; and a surrender by him to the plaintiff, in 1824, by entry of presentment of surrender out of Court; but no *admission*.

The rolls were proved by one Sayer, his deputy—who was now called to prove them—who had been appointed by word of mouth only, and who had *acted* as steward for eighteen years.

WIGHTMAN, J.—He *acted* as such; that is sufficient.

Garth objected that the rolls were not signed by the steward.

Heirship proved as a matter of reputation, by an intimate friend of the family at the time of birth.

WIGHTMAN, J.—Signing is not necessary. It is sufficient that they are *proved* to be the *rolls*.

It was then proved, by Sayer, that he had known the plaintiff's family intimately for twenty years, and had always known the plaintiff as his father's eldest son. This was the evidence of heirship.

Garth objected that the evidence was insufficient; but

WIGHTMAN, J., held it sufficient; as it was enough, even in a pedigree case.

Verdict for the plaintiff.

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Kingston, coram Erle, C. J.

WHITMORE AND OTHERS (Assignees of DEMETRIO) *v.* LLOYD.

Spring Assizes.

D., the consignee of a cargo, on the day on which he stopped payment, received the bill of lading, and transferred it, being then insolvent, to a person or persons whom he called "L. & Co.," and from whom, after he had been adjudged bankrupt, on his own petition, one M. professed to purchase it, and afterwards H. & Co. *bonâ fide* bought it from M. before the ship arrived. The assignees in bankruptcy of D. seized it on arrival; an issue was raised whether they were entitled to it: *Held*, 1, that, there being evidence that the whole transaction between D., "L. & Co." and M. was collusive and colourable, and with intent to defraud D.'s creditors, there was a case for the plaintiffs. 2. That the question was, whether M. purchased *bonâ fide*. *Quære*, whether on the one hand even if she did, the transaction was not avoided by knowledge of a prior act of bankruptcy, or whether, if she did not, H. & Co. having bought *bonâ fide*, were protected, or whether the plaintiffs, as assignees, could set up fraud by D. as the consignor.

THE declaration stated that the plaintiffs, as assignees, had taken possession of the ship *Gloria* and cargo; and that, in consideration of their withdrawing therefrom, the defendant promised that the same should be sold as soon as possible, on the best terms; and that in case the plaintiffs were or ought to be entitled by law to the cargo, or the proceeds thereof, either alone or jointly with one Parisse, the defendant would pay to the plaintiffs the amount of the proceeds; and averment, that the cargo had been sold, and that the plaintiffs *were and are entitled by law to the proceeds.*

Breach, non-payment.

Pleas: denying the promise, and also the averment (which was the main question at issue) that *the plaintiffs were or are at law entitled to the proceeds.*

In July, 1859, the cargo was shipped by Parisse, a Greek merchant at Odessa, to Demetrio, the bankrupt, drawing a bill on him for the amount, and sending him the bill of lading and charter-party, dated 25th July, 1854, and by which latter the cargo was consigned to Parisse's order (*a*). There was an indorsement on the bill of lading by Parisse, "Consigned to the order of Demetrio & Co., of London," and the charter-party also had an indorsement, substituting Demetrio for Parisse as consignee. Demetrio, on advice of the consignment, accepted the bill of exchange, and effected an insurance on the cargo.

There were bill transactions between Demetrio and cer-

(*a*) *Brown* v. *Hare*, 27 L. J., Exch. 372.

tain persons with whom he proposed to correspond as "Labaus & Co."

On the 30th July, Demetrio wrote to Messrs. Labaus in these terms: "According to arrangement, not being able to pay you to-day, as promised, the 2,550*l.*, proceeds of your bill for 7,700*l.* negotiated by us for your account, we are willing to lodge with you, as security until final payment to you of the above amount, the cargo per *Gloria*, the documents for which will be handed to you as soon as completed; and in the meantime we enclose charter-party for the same."

On the 8th August the bill of lading arrived.

On the 8th August Demetrio & Co. wrote to Messrs. Labaus to the effect that, with reference to the previous letter regarding the deposit of the cargo of the *Gloria* as security, &c., they sent the *bill of lading*, &c., and Demetrio wrote to the captain, directing him to abide the orders of Messrs. Labaus.

On the same day, 8th August, Demetrio stopped payment, and this was published in the "Times" of the following day, the 9th August.

On the 24th August, a document, in the following terms, was signed by the persons called Labaus & Co.:—

"Sold this day, to Miss May Martin, the cargo of wheat shipped *per* the *Gloria*, as per bill of lading dated 25th July, 1859, &c."

Which was enclosed in a letter signed in the same way, along with invoice, making the gross amount 2,407*l.*, and the nett amount (less freight and cargo) 1,899*l.*

And Demetrio then indorsed to Miss Martin his letter to the captain, directing him to deliver to the order of Messrs. Labaus.

On the 26th August, Demetrio was made bankrupt on his *own petition*.

The bankrupt was examined in bankruptcy, and the assignees imputed fraud and collusion in the transactions between him and the persons called Messrs. Labaus.

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WHITMORE and Others (Assignees of DEMETRIO) v. LLOYD.

On the 15th October, the ship being expected at Cork, Hall & Co. bought the cargo there from Miss Martin, *bonâ fide*, for 1,961*l.* nett.

On the 17th the ship came to Falmouth, with cargo on board, and the plaintiffs as assignees took possession.

The defendant then gave the undertaking stated in the declaration, and which raised the question whether they were entitled to the proceeds as against Hall & Co., the *bonâ fide* vendees of Miss Martin.

The cargo was sold at Cork for the nett amount of 2,061*l.*, which was the sum claimed by the plaintiffs' assignees.

Bovill, for the plaintiffs (with him *Ballantine*, Serjt., and *Hayman*), opened that the whole transaction was a mere juggle, and that there was no such firm as "Messrs. Labaus," and that Miss Martin was in collusion with the bankrupt to defraud the assignees of the cargo.

Witnesses were called in support of the case, showing that Demetrio, the bankrupt, had gone under other names, had engaged a boy as clerk at an office, on the door of which was the name of "Messrs. Labaus," and at which the bankrupt himself gave directions, &c. That Miss Martin had said she did not know the bankrupt, whereas she had again and again lived in the same house, and were intimately acquainted, &c. That the indorsements, &c., professedly signed by "Messrs. Labaus," were really in the handwriting of the bankrupt Demetrio. And that Demetrio and the other parties were, between the 9th and 26th August, in constant communication.

Lush (with him *J. Brown* and *Digby*), for the defendant, submitted that there was no case, there being no evidence that the bill of lading was in the hands of the assignees or of the bankrupt after any act of bankruptcy; Demetrio having been made a bankrupt upon his own petition, on the 26th

August, without relation back to any prior act of bankruptcy (*a*). And that the plaintiffs had not shown that the bill of lading was *not* transferred *bonâ fide* and for valuable consideration *after* that day.

ERLE, C. J., declined to stop the case.

Lush, for the defendant, admitted that the bankrupt had defrauded his creditors in the transaction, having made away with the cargo *before* his petition, and done so designedly, to *prevent* the operation of the bankruptcy upon the transaction. But he contended that it was immaterial whether the sale was to Labaus (whom he represented as a real firm) or to Miss Martin, but that it was sufficient that the purchase by her and the sale to Hall & Co. (the real defendants) were equally *bonâ fide* and for valuable consideration.

That the assignees should have disaffirmed the sale to Miss Martin before the sale to Hall & Co., according to the doctrine of *White* v. *Garden* (*b*); that not having done so the title of Hall & Co. was indefeasible by the prior fraud; and that therefore the plaintiffs were *not* entitled to the proceeds.

He also took the point that the Factors Act applied to protect Hall & Co.; Miss Martin having been, at all events, a person entrusted with the bill of lading, &c., by the true owner, whether Demetrio the bankrupt or Labaus & Co.

He called Miss Martin, who appeared to have been a person of some property, and she swore that she had made the purchase from the bankrupt, and paid the price in cash, for which she presented his receipt.

Hall was also called and proved that the purchase by Hall & Co. was *bonâ fide*, they having bought through respectable brokers in the ordinary course of business, and at the market price of the day (and of this there was no doubt).

(*a*) *Monk* v. *Sharp*, 27 L. J., Exch. 29.

(*b*) 10 Com. B. Rep. 919. But see *Kingsford* v. *Merry*, 11 Exch. 577; 1 H. & N. 503; and *Higgons* v. *Burton*, 27 L. J., Exch. 342.

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WHITMORE and Others (Assignees of DEMETRIO) v. LLOYD.

An attempt was made to show that on the bill transactions the bankrupt was indebted to Messrs. Labaus in 2,500*l.*

But neither the bankrupt nor the persons called Messrs. Labaus were called. The bankrupt had absconded.

ERLE, C. J. (to the jury).—Are you of opinion that Miss Martin, on the 24th or 25th August, *bonâ fide* purchased the cargo? For, though the bankrupt intended to transfer the property fraudulently to "Labaus," yet, if *before* his bankruptcy there was a *bonâ fide* purchase from "Labaus," by Miss Martin, she and her transferees, Hall & Co., would be protected (*a*).

Did Miss Martin purchase *bonâ fide* on the 25th August? If so, find for the defendant; if not, for the plaintiffs (*b*).

The point as to the Factors Act I will reserve.

Verdict for the plaintiffs (*c*).

(*a*) 12 & 13 Vict. c. 106, s. 133, all contracts, dealings and transactions by and with any bankrupt *bonâ fide* made and entered into before the date of the fiat or filing of the petition * * * shall be deemed to be valid * * * provided the person so dealing, &c. had not notice of any prior act of bankruptcy. By sect. 134, it is further provided that no purchase from any bankrupt *bonâ fide* and for valuable consideration, where the purchaser had notice of an act of bankruptcy, shall be impeached by reason thereof, unless a fiat or petition for adjudication shall have been sued out or filed within twelve months after (not saying *upon*) such act of bankruptcy.

(*b*) The plaintiffs, as assignees, claimed under the *creditors*, and *inter alia*, the vendor, Parisse, *not* under the bankrupt; *Freshney* v. *Wells*, 26 L. J., Ex. 129; and therefore they could now set up fraud in the bankrupt vitiating the *original* sale.

(*c*) A rule was obtained in Q. B. upon the ground that the purchase by Hall & Co. was valid, even although the purchase by Miss Martin was not so; and also on the point as to the Factors Act. But the case was afterwards arranged before it was argued.

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Coram Wightman, J.

NAYLER *v.* YEARSLEY.

Spring Assizes.

On a contract to pay a traveller, &c. y commission, no implication arises of a yearly hiring, nor, without an express and clear stipulation, is there any obligation to pay the commission on orders, &c. from customers originally obtained by the agent, but sent after he has ceased to be so.

THE first count stated that, in consideration that the plaintiff, at the defendant's request, would perform his services, and act for the defendant as his agent, for the purpose of collecting and obtaining advertisements to be inserted and continued in a certain publication, for commission or reward to the plaintiff in that behalf, the defendant promised the plaintiff that he would employ the plaintiff as such agent as aforesaid, and would continue to employ him as such, and that he should be continued as such until either party determined such agency by a reasonable notice given by the one to the other of them of his intention to determine the same, and the plaintiff performed his services and acted for the defendant as such agent, and on the terms aforesaid, and the defendant employed him as such on the said terms. General averment.

Breach: that the defendant, without reasonable notice, discontinued to employ the plaintiff as such agent as aforesaid, and refused any longer to continue to employ him as such, and determined such agency; whereby the plaintiff had lost and been deprived of the commission and reward which he would have obtained had he been continued as such agent.

Common count for work and services.

Pleas to the *first* count: denying the promise and the breach.

To the *second* count, never indebted and payment.

The particulars were as follows:—

The plaintiff seeks to recover the sum of 77*l.* 10*s.* commission, payable by defendant to plaintiff, for his services in and about the obtaining and being ready and willing to obtain advertisements and renewals of advertisements in

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the "Medical Circular," between the 1st of October, 1859, and the 11th of January, 1860 (the date of the writ).

Parry, Serjt., and *Barnard* for the plaintiff.

Lush and *Sumner* for the defendant.

The plaintiff, in September, 1857, had been engaged to obtain advertisements for the defendant's paper, the "Medical Circular" (then established for some years); the plaintiff asked for a salary, but this was not acceded to, and he was told that instead of salary he should have twenty per cent. commission; that what he brought should be his own, and that he should have his renewals as "long as they continued," which the learned Judge took down as meaning as long as the plaintiff and defendant should continue together, and so it seemed to be taken. This commission was to be paid on every advertisement at *the time of insertion* each week, and he was paid accordingly. The defendant had issued a circular, mentioning the plaintiff as his agent for advertisements.

In 1858 disputes arose between the parties as to advertisements which were not paid for, and for which the defendant claimed to have return of commission.

On December 28th, 1858, the plaintiff was told, by the defendant's order, that no more advertisements would be taken from him; that he was to have no "renewal orders," and to do no further business with the paper. The plaintiff admitted that he had been "paid in full all his commission to the end of the year." But he added that the defendant had continued to insert advertisements of his procuring after his dismissal; no question, however, was asked as to the number or nature of advertisements so inserted after dismissal, though he stated that he had given defendant a list of the advertisements he claimed as his, to the number of 120.

The plaintiff's case was rested on the *first* count, and he stated on examination that he claimed to be paid commis-

sion on all advertisements received at any time from the customers he had originally obtained.

It appeared that he collected advertisements for *other* papers.

He admitted that in the middle of October he had been told that his advertisements would only be received "a few weeks longer."

A witness was called to prove that it was customary to employ canvassing agents on such terms as the plaintiff had stated, and that it was considered that they were entitled to reasonable notice before dismissal; but

WIGHTMAN, J., held the evidence not sufficient (*a*); and this being the plaintiff's case,

Lush, on behalf of the defendant, submitted that there was no evidence of the contract, and that on the agreement for commission there arose no implication of an employment for any particular time.

WIGHTMAN, J., was of that opinion.

Parry, Serjt., applied for leave to amend by adding a count for commission.

WIGHTMAN, J., declined, and directed a nonsuit; the plaintiff to have liberty to move to enter a verdict for the plaintiff if there were any evidence to go to the jury, and if the verdict were so entered the amount was to be settled by the Master (*b*).

(*a*) *Williams* v. *Byrne*, 7 A. & E. 177.

(*b*) The Court of Exchequer refused a rule on the ground of misdirection as to the first count, but granted one on the ground that there was evidence on the second count, which rule was discharged.

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NORFOLK CIRCUIT (a).

Cambridge, coram Williams, J.

REGINA *v.* WILLIAM MITCHELL.

Spring Assizes.

A certificate in the following form:—"I hereby certify that the within-named William Michell is gaining his living by hawking," the production of which was necessary, in order that the prisoner might obtain payment of a sum of money to which he was entitled:—*Held*, not to be an undertaking, warrant, or order for the payment of money within the meaning of the 11 Geo. 4 & 1 Will. 4, c. 66.

For forging such a certificate the prisoner must be indicted for a forgery at common law.

THE first count of the indictment stated that the prisoner forged a certain warrant for the payment of money, to wit, for payment of the sum of 2*l.* 17*s.* 3*d.*, with intent to defraud against the form, &c.

Second count, that the prisoner did utter, dispose of, and put off a certain forged warrant for the payment of money, to wit, for the payment of the sum of 2*l.* 17*s.* 3*d.* (he the said prisoner well knowing at the time he so uttered, disposed of, and put off the said warrant then and there well knowing the same to be forged), with intent to defraud against the form, &c.

It appeared that the prisoner was a convict, and that he had formerly been in the Lewes convict establishment, from which he had been liberated on a ticket-of-leave. There was a rule in that establishment by which every prisoner was credited with a certain sum of money, called "convict money." The prisoner was entitled under this rule to the sum of 2*l.* 17*s.* 3*d.*, which would have been paid to him upon the production of a certificate signed by two witnesses, and the clergyman of the parish, that he was getting his living honestly.

In September last the prisoner sent by post to the superintendent of the Lewes convict establishment a certificate in the following form:—

"I hereby certify that the within-named William

(a) Reported by H. Markby, Esq.

Mitchell (the prisoner) is gaining his living by hawking. Dated 30th Sept, 1859.

"Catherine Bull, Grocer, Boongate, Peterborough.

"(Signed) W. B. Hopkins, Vicar, Wisbech St. Peter's."

Both the signatures were forgeries.

The learned Judge, upon the production of the above document, expressed an opinion that it was not an "undertaking, warrant, or order for the payment of money," within the meaning of 11 Geo. 4 & 1 Will. 4, c. 66.

Abdy, for the prosecution, referred to *R.* v. *Rodgers*(*a*).

WILLIAMS, J.—This document is not addressed to any person by whom money is to be paid. Upon the face of it, it is merely a certificate of good character.

The prisoner was accordingly *acquitted.*

A fresh indictment was then preferred, in the first count of which the prisoner was charged with forging a certain certificate in writing, with intent to defraud, against the form, &c.

Second count: that the prisoner did utter and publish as true a certain false, forged, and counterfeited certificate in writing (he the said prisoner well knowing the same to be false, forged, and counterfeit) with intent to defraud.

Third count: that the prisoner did unlawfully, knowingly and falsely pretend to Pearce Giles, that a certain false and counterfeit paper in writing, in the words and figures following (setting out the certificate as above), was true and genuine, and that the same had been signed by Catherine Bull, of Boongate, in Peterborough, in the county of Northampton, and by William Bonner Hopkins, of Wisbech St. Peter's, in the Isle of Ely, in the county of Cambridge. By means of which said false pretences the said prisoner did then and there unlawfully and fraudulently attempt to obtain from Pearce Giles certain money, to wit, to the amount of 2*l.* 17*s.* 3*d.* of money of

(*a*) 9 C. & P. 41.

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our Lady the Queen, with intent to cheat and defraud. Whereas in truth and in fact, &c.

The same evidence was given upon this as upon the former indictment.

The jury found the prisoner guilty.

Abdy for the prosecution. The prisoner was undefended.

Bury St. Edmunds, coram Cockburn, C. J.

REGINA *v.* MARIA KNIGHTS.

Spring Assizes.

A woman knows she is about to be confined, and who wilfully abstains from taking the necessary precautions to preserve the life of the child after its birth, in consequence of which the child dies, is not guilty of manslaughter.

THE prisoner was indicted for the wilful murder of her female child. It appeared that the child was found dead at seven o'clock in the evening, in a linen bag in the prisoner's bed-room, the after-birth and navel-string were in the bag with it.

H. Mills, in opening the case for the prosecution, said, that if the jury should not think there was sufficient evidence to satisfy them that the child was born alive and had died by the hands of the prisoner, they would then have to consider whether she was not guilty of manslaughter. He should prove that the prisoner had already had one child, and she could not, therefore, be ignorant of the signs of labour. It would also be proved that the prisoner was on her bed at five o'clock, two hours before the body was discovered, and was asked by her mistress whether she was pregnant, which she denied. If, therefore, the jury thought that she knew she was about to be delivered, and that she wilfully abstained from taking the necessary precautions to preserve the life of the child after its birth, and the child died in consequence of that criminal neglect, then the prisoner would be guilty of manslaughter.

COCKBURN, C. J.—Have you any authority for that proposition? I never heard such a doctrine laid down before.

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Mills.—I contend that it is so on general principles of law (*a*).

After the case for the prosecution was concluded and the above facts had been proved, as well as some facts which led to the conclusion that the child had been born alive, and had died by the hands of its mother, the LORD CHIEF JUSTICE said, that he had consulted WILLIAMS, J., and that they were both of opinion that the prisoner could not, on this evidence, be guilty of manslaughter, according to the view propounded by the counsel for the prosecution.

The prisoner was eventually found guilty of concealing the birth of the child, and was sentenced to two years' imprisonment with hard labour.

Henry Mills for the prosecution.

Orridge for the prisoner.

(*a*) See the case of *R.* v. *David Hughes*, 26 L. J., M. C. 202, in which a distinction is taken between the malicious omission of a duty and the wilful omission of a duty which is not malicious. If death be caused by the former, it is there said to be murder; if by the latter, manslaughter.

Guildhall, coram Byles, J.

COLLINS *v.* GASHON.

Where, at the trial, a document is called for and its production declined, the party so declining to produce it cannot afterwards make use of it for any purpose.

DURING the trial the production of a certain letter in the possession of the defendant was demanded on behalf of the plaintiff, which demand the defendant's counsel met with a refusal. At a subsequent stage of the case, and for a different purpose, they (defendant's counsel) proposed that it should be read.

BYLES, J.—I cannot now permit the letter to be read. You made your election in the first instance when you re-

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fused to produce it, and I hold that the time for its production has passed. You have now no right to use it for any purpose (*a*).

Lush, Q.C., and *Labouchere*, for the plaintiff.

M. Chambers, Q.C., and *Hawkins*, Q.C., for the defendant.

(*a*) *S. P. Doe* d. *Thompson* v. *Hodson*, 4 Jur. 1202.

Guildhall, coram Erle, C. J.

HIBBERT *v.* BAYLEY AND ANOTHER.

Hilary Term.

Auctioneers having put up a ship for sale, under the usual conditions, *inter alia*, that the highest bidder should *immediately* sign the contract and pay a deposit, or that the ship should be put up again, allowed the highest bidder, who was unknown to them, to go away without signing or paying a deposit. He could not be found, and the ship was sold by the plaintiff for less than the pretended purchaser had bid, but also for less than the defendants could have obtained by private contract: —*Held*, that if the jury thought there had been a neglect of duty, but no real injury, they should find for the plaintiff for nominal damage.

THE declaration stated, that the plaintiff retained the defendants, and they accepted such retainer, as his agents, for hire and reward to sell for him a ship, upon the terms that they should use due care in selling it, and on selling, that the conditions of sale under which it was sold were duly complied with. General averment.

Breach: they did not use due care in selling, that the conditions of sale were complied with by a person who became the purchaser, but that they *negligently omitted to procure the signature* of the said person to the contract for the completion of the said purchase, as required by the conditions. Secondly, that they *omitted to procure from him the payment of the deposit*, whereby the sale became abortive, and the plaintiff lost the deposit and all benefit which he would have otherwise obtained from the sale; and was obliged to put the ship up again for sale, and obtained a smaller sum for her.

Pleas: denying the retainer and the breach.

In July, 1859, the defendants, auctioneers in London, received instructions to sell the ship by private contract, and afterwards to sell by public auction, the reserve price being fixed at 3,000*l*. In August, the ship was put up, but the

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reserved price not being bid for her, she was bought in by the owner. Afterwards the plaintiff instructed the defendants to put her up peremptorily for sale on the 8th September, the reserved price being fixed at 2,925*l.* The ship was accordingly so put up, upon the usual conditions, for sale: *inter alia*, that the highest bidder should forthwith sign the contract and pay a deposit. There were several biddings until the ship was run up to 2,900*l.*, when a person, unknown to the defendants, bid 2,925*l.*, and then another person, also unknown to them, bid 2,950*l.*, and the ship was knocked down to him. He gave the name of "Shaw & Co., Bristol," whom the defendants thereupon announced as the purchasers, and then they asked him to come forward and sign the contract.

The pretended purchaser came to the defendant's clerk, who attended the sale, and excused himself from doing so until, in half an hour, he would pay the *deposit*. The defendants were then engaged in the sale of another ship, and it was the duty of the clerk to note down the biddings and fill in the contracts, and he wrote down the name Shaw & Co. as the purchasers. The plaintiff, who was present at the sale, came forward and asked the buyer's name, and whether it was "all right," to which the defendants and their clerk replied, that they supposed so, telling him at the same time what had happened. But the pretended purchaser never appeared, and could not be discovered. The ship was afterwards sold by the plaintiff for 2,600*l.*, and he claimed from the defendants the difference between that sum and 2,950*l.*, viz. 350*l.*

The defendants were called, and stated that it was not unusual for a purchaser, who happened not to have money in his pocket to pay the deposit, to be allowed to go away to procure it, on a promise (as in this case) to return promptly and pay it, and that sometimes the purchaser was allowed to withdraw for that purpose without signing the contract.

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But it appeared that this was when the purchaser was *not* unknown (as in this instance he was) to the auctioneer, or left an address, known to be real, in *London*.

Now, it was admitted, that the usual course was to fill up the contract and tender it for signature *immediately*.

As to damage the defendants gave evidence to show, that they could have sold for *more* than 2,600*l*., if the plaintiff had not fixed a reserved price so much higher.

ERLE, C.J. (to the jury).—The question is, whether you think that there was a breach of duty—that is, a want of due care, in letting the purchaser go away without signing or paying, and without declaring the bidding to be void, and putting the ship up again for sale *instanter*. By the conditions of sale (*a*) the purchaser was to pay a deposit *immediately*, in order to bind the bargain, and in case of default, the auctioneer to re-sell. Was there a want of due care in not asking the purchaser to pay the deposit, and in case he did not do so, taking that course at once? If so, find for the plaintiff. As to damage, consider what the plaintiff has really *lost* by the first sale being abortive.

Of course it is not to be assumed (but rather the contrary) that if the defendants *had* asked for the deposit, they would have got it. Most likely the pretended purchaser would have excused himself and gone away. But then the defendants might, and it is to be assumed *would*, have put the ship up for sale again, and sold to the *next* bidder, perhaps for more than 2,600*l*., but it might have been for less than 2,925*l*., and there is evidence that more than 2,600*l*., though less than 2,925*l*., could have been obtained for the plaintiff before. What, then, was the real loss to the plaintiff, if any, from the neglect of the defendants? If you believe there was a breach of duty, but *no* real injury, find for the plaintiff for nominal damages (*b*).

Verdict for the plaintiff, damages 40*s*.

(*a*) Which bind the auctioneer; *Sykes* v. *Gibbs*, 5 M. & W. 651; *Brown* v. *Staton*, 2 Chit. Rep. 333.

(*b*) Wherever there is a breach

of duty there is a right to nominal damages; *Williams* v. *Marzetti*, 1 B. & Ad. 415; *Westaway* v. *Frost*, 17 L. J. 201, 286. And there may be a right to *general* damage, though actual damage is not proved; *Rolin* v. *Steward*, 23 L. J., C. P. 148; otherwise, where the act or neglect is not actionable *per se*, but is only so by reason of the *consequential damage* (1 Chitty on Pleading, vol. i., pp. 148, 413), which must be *stated* expressly, and be actually proved, in order to be recovered, although it may be stated generally, as loss of credit, &c., and need not be stated with such particularity as *special* damage. Here the damage was not only not proved (for *non constat* that through the failure of the first sale the plaintiff got any less for his ship than he might otherwise have done), but the jury thought it *disproved;* and hence the plaintiff was entitled only to nominal damages.

Westminster, coram Byles, J.

MORRIS *v.* WISE.

Hilary Term.

Action of trespass and false imprisonment. Plea: not guilty by stat. 7 & 8 Geo. 4, c. 30. *Quære*, whether grass is a "cultivated root" within this statute, on a charge made against the plaintiff of stealing grass, under which he was taken into custody.

A person justified under this statute in causing the arrest of another must do it "immediately," and he must send him by the direct road to the lock-up; for if he sent him *extra viam* he would be a trespasser against the person so arrested.

TRESPASS for false imprisonment.

Plea: not guilty by stat. 7 & 8 Geo. 4, c. 30.

Collier, Q.C., and *Prentice*, appeared for the plaintiff.

Pigott, Serjt., and *Smith*, for the defendant.

The defendant, it appeared, was a farmer, occupying a farm called Portobello-fields, near Kensington, as tenant to two ladies named Talbot. One of those fields adjoins the Great Western Railway, and it appeared that the railway company had staked out some land two or three years ago in one of those fields twenty-nine feet parallel to the rails, which they had some contract or agreement with the Misses Talbot to take. On the 10th of June last year, when the grass was high, two labourers, sent by the Great Western Railway Company, proceeded to put back the post and rail fence in a line with the stakes or pegs driven into the field in the occupation of the defendant, and in order to find the pegs and measure out the ground accurately, it was necessary for them to cut a sward of the grass, and for this purpose they borrowed a scythe of the plaintiff, who lived close by, and who keeps a horse and cart to carry out laundresses's linen. The plaintiff lent

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them his scythe and saw the men cut the grass, believing they had authority for what they did; and the men in return for his civility to them gave him the grass they had cut for his horse, which the plaintiff was carrying away in a sack, when the defendant, accompanied by his son, came up to see what they were about. He had seen the men measuring in his field the day before and had demanded their business there, and they had referred him to the office of the Great Western Railway Company. On seeing the plaintiff walk off with a sack of his grass, the defendant gave information to the police, and next day had the plaintiff taken into custody on a charge of stealing his grass. He was first taken by the direction of the defendant's son to his father's house, which was half a mile out of the way to the police-office, and then to the Kensington police-station, where, after being detained some hours, the charge was dismissed; and for this arrest and imprisonment the present action was brought.

BYLES, J.—Before I nonsuit the plaintiff, show me the section of the statute under which you justify.

Smith drew attention to the 41st section of the 7 & 8 Geo. 4, c. 30, to which the margin of the plea referred, which required notice in writing of the action and the cause thereof to be given to the defendant one calendar month at least before the commencement of the action. This had not been done. Then sect. 22 provided, that "if any person shall unlawfully and maliciously destroy or damage with intent to destroy any cultivated root or plant used for the food of man or beast, or for medicine, &c., growing in any land open or inclosed, not being a garden, orchard or nursery ground, every such offender, being convicted thereof before a justice of the peace, shall, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only or to be imprisoned and kept to hard labour for any term not exceeding one calendar month," &c.

Collier.—The charge is for stealing and not for committing a malicious injury to growing crops. It is not under the statute at all.

BYLES, J., thought there was a manifest difference between the charges of injuring property and stealing property. The defendant was pursuing the plaintiff as a thief. He was bound by the sort of charge he then made, which was not within the statute pleaded. He thought the defendant should have leave to amend and the plaintiff leave to move.

Smith then asked leave to amend by adding the stat. 7 & 8 Geo. 4, c. 29, ss. 43 and 75. Sect. 43 was as follows:—"If any person shall steal, or shall destroy or damage with intent to steal, any cultivated root or plant used for the food of man or beast, or for medicine, &c., or for or in the course of any manufacture, and growing in any land, open or inclosed, not being a garden, orchard or nursery-ground, every such offender, being convicted before a justice of the peace, shall, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only or to be imprisoned and kept to hard labour for any term not exceeding one calendar month," &c.

Collier submitted that "any cultivated root or plant" did not apply to common grass. It applied to turnips, carrots, potatoes, cabbages, &c.

BYLES, J.—The defendant thought the plaintiff was committing an offence under this Act, and the plaintiff was therefore bound to give notice of action under the statute. The question was as to a nonsuit. He thought it right to mention that another question arose. The plaintiff was taken *extra viam;* he was not taken straight to the magistrate at the police-office, but to the defendant's house, which was half a mile out of the way. On this ground, he thought the plaintiff must have a verdict. They must both

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go to the jury, and he would allow both to move, and reserve the point as to a cultivated plant being within the meaning of the statute.

Pigott said, the plaintiff ought to have new assigned as to the *extra viam*.

BYLES, J., thought not; the plea was not guilty by statute, though if he had been asked for leave to plead specially he should have allowed it. He thought it was all one trespass, and that the plaintiff need not new assign.

Pigott then addressed the jury for the defendant. As to the taking of the plaintiff out of the way to the defendant's house, that was to the plaintiff's advantage, to get the matter there settled if possible; and, with regard to the arrest, the defendant was the occupier of the field and knew nothing of the Great Western Railway Company's contracts with his landlady. The field was in his occupation and he paid rent for it, and had a right to the crop of grass growing upon it. He was under notice to quit, but that notice did not expire till Michaelmas. Those who went, therefore, into his meadow were trespassers, and when he saw several men cutting a sward of grass in his field, and the plaintiff walking off with a sackful of the grass on his shoulders, he believed him to be stealing it, and very naturally gave him into custody.

Collier, in reply, said, the defendant ought to have relied on his civil remedy, and not have perverted the criminal law, which he said he had done because of an old grudge against the plaintiff.

BYLES, J., in summing up, told the jury the first question was, had the plaintiff any right to take the grass. The defendant's counsel told them it belonged to the occupier of the land. But it was one thing to say that a man was a trespasser and another to say he was a felon. The defendant charged the plaintiff not with taking the grass

but with stealing it. Were they of opinion on the facts proved, that the plaintiff took the grass feloniously; if they were not of that opinion the justification failed. The last act of parliament referred to said, you might arrest a man whom you found stealing, provided you "immediately" arrested him; and if you do arrest and commit a mistake, honestly believing that the man you arrest did steal, although he did not, yet you are justified, but the arrest must be "immediate." Did the defendant really believe the plaintiff did steal, though you should think he did not? He should not trouble them with the question, whether "any cultivated plant" meant grass. Then there was another question; it might be that the defendant was justified, supposing he had only sent the plaintiff to the lock-up, but he sent him in a different direction. It might be that he was justified altogether, and it might be that he was a trespasser *ab initio*. Suppose the arrest to be justified, but not the taking out of the way, what damages would they give for that? and lastly, supposing the whole trespass not to be justified, what damages would they give for that? They must find whether the plaintiff was stealing the grass; and, secondly, whether the defendant believed that he stole the grass, and *bonâ fide* put the criminal law in force against him.

The jury found the plaintiff did not steal the grass; and they considered the defendant must have known that he was not stealing it, and gave 40*s.* damages for the trespass *extra viam*, and 10*l.* damages for the trespass and false imprisonment, if not justified in point of law (*a*).

(*a*) *Vide Norwood* v. *Pitt*, 28 L. J., Exch. 212; *S. C.* 29 L. J., Exch. 127.

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Coram Erle, C. J.

After Easter Term.

SNELL *v.* BICKLEY.

On a contract for the transfer by a lessee of "all his interest in a house, with the *fixtures, &c., as held by him,*" for an entire sum, an action for falsely *warranting* the fixtures to be the lessee's, *held* to be maintainable, on evidence that the defendant, at the time of the agreement, handed the plaintiff an inventory of them; and afterwards, being taxed with selling them, said he "thought they were his."

FIRST count, for false representation of the value of a business.

Second count, that the defendant, by falsely warranting certain fixtures to be his property, sold them to the plaintiff, whereas they were not nor any of them his, and the plaintiff was afterwards deprived of them, and lost the price paid for them.

Plea: not guilty, denying the warranty, and that the fixtures *were* the defendants.

Huddlestone and *T. Chitty* for the plaintiff.

The plaintiff in September, 1854, entered into an agreement in writing with the defendant, as follows:—

"E. Bickley agrees to let and transfer all his right of lease and interest whatsoever, in the house *and premises* known as, &c., *with all the fixtures, fittings*, and all other appurtenances *as held by him* from Farr, for 100*l.* Snell to have and hold the tenement upon the same terms and conditions as contained in the lease to Bickley from Farr."

The plaintiff paid 10*l.* as a deposit, and afterwards 90*l.*, making up the sum of 100*l.*

He did not see the lease, which contained the ordinary clauses. He owns that an *inventory*, showing the fixtures, &c. was handed to him by the defendant at the time of the agreement. The list included stoves, coppers, boiler, partitions, &c.

The landlord had claimed the fixtures and fittings, and would not allow the plaintiff to remove them.

The defendant was told this by the plaintiff in the landlord's presence, and did not dissent from it, but said he thought they were his.

The jury found for the defendant on the first count.

On the second count,

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Hawkins, for the defendant, objected, that there was no case; but

ERLE, C. J., thought there was evidence, which he left to the jury.

Verdict for the plaintiff, damages 7*l.* 10*s.*

Coram Wilde, B.

BUST *v.* HANCOCK.

Trinity Term.

ACTION for arrears of wages and also for wrongfully dismissing the plaintiff from the service of the defendant without a month's notice or wages.

Plea: denying the contract.

M. Lloyd for the plaintiff.

Prentice for the defendant.

It appeared that the plaintiff had been engaged by the defendant in December, 1859, to serve him during the ensuing year, at a monthly salary of 14*l.*, which had been paid for the months of January and February, 1860, but not for the month of March. A dispute then arose, which ended in the plaintiff's dismissal on the 30th April.

The salary for March and April was claimed.

There was no defence upon the merits, but the counsel for the defendant called for the original writ of summons, and that not being produced, put in a copy of it, dated the 5th March, and contended that the cause of action had not accrued before the commencement of the suit (*a*).

Where the question arises at the trial, whether the cause of action arose before the commencement of the suit, the date of the writ, as stated in the *nisi prius* record, must be taken as the true date; and the proper course, if it is erroneous, is to apply at Chambers to have it amended according to the writ.

But *semble*, that if the point were not the real question in controversy between the parties, the *writ* might be amended at the trial.

(*a*) Even if it had been so, *semble* that (there being no defence) the date of the writ might have been amended under sect. 222 of the C. L. P. Act, 1852, the terms of which are very large, "all defects and errors in *any proceedings* in writ causes." Before that act, the date of a demise in ejectment might be amended; *Doe* d. *Parsons* v. *Heather*, 8 M. & W. 158; *Doe* d. *Simpson* v. *Hall*, 5 M. & G. 795; *Doe* d. *Rabbits* v. *Welch*, 4 D. & L. 115. And a writ of summons might be amended to save the statute; *Carne* v. *Malin*, 20 L. J. Exch. 434; *Craufurd* v. *Cocks*, *ibid.* 169. And the date might be

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The counsel for the plaintiff appealed to the *nisi prius* record, in which the date of the writ was stated to be the 5th *May*, and

WILDE, B., held this to be conclusive, and declined to admit of evidence to falsify it, the defendant's proper course being, if it were erroneous, to have applied to have it amended (*a*).

Verdict for the plaintiff (*b*).

amended so as to accord with the *præcipe*; *Kirk* v. *Dolby*, 6 M. & W. 636. And an error in the copy would be merely irregularity in the copy, which will not make the *service* even irregular; *Hasker* v. *Jarman*, 1 C. & M. 408; and see *Gibson* v. *Vorley*, 26 L. J., Q. B. 79.

(*a*) The point, to be material, must arise on the *evidence*. Even where the record in an action of slander stated that the writ issued on the 4th of June, and that the words were spoken on the 27th, it was held that there was no ground for arresting the *judgment*; the date of the slander, as to law, not being material; *Steward* v. *Layton*, 3 Dowl. 430. But that a cause of action appearing on the evidence not to have arisen before suit, is always a material variance, as in the case of credit unexpired, *Paul* v. *Tod*, 15 L. J., C. P. 177; or of title in ejectment not completed before action, *vide supra*, p. 57, although two distinctions must be borne in mind—the distinction between the cause of action and the *evidence* of it; for facts occurring after action may prove a cause of action *before*; *Perry* v. *Slade*, 15 L. J., Q. B. 90; and the distinction between the cause of action and the *damage*; for a jury may often, and indeed generally, give *prospective* damages; as in the very case of dismissal of a servant, when the action may be brought *before* the period for which he was retained, and *full* damages recovered for the whole period; *Goodman* v. *Pocock*, 19 L. J., Q. B. 410. But though the variance will be always *material*, it is probably amendable where it does not appear to be the *question in controversy between the parties*, as it usually is in the case of credit unexpired. *There* it would perhaps be unamendable.

(*b*) The Court was moved, but the ruling upheld, and a rule was granted, chiefly on the ground that the writ had been improperly altered by the plaintiff's attorney. The *præcipe* was for the 5th of *May*, the writ was dated erroneously *March*; but the stamp, which is always dated, only it had been erased, would have shown the true date. The Court will not permit a plaintiff to retain a verdict upon a record which has been improperly altered by him, for the very reason that *at the trial* it is taken as conclusive; *Tucker* v. *Neale*, 1 Exch. Rep. 468.

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Westminster, coram Pollock, C. B.

SLACK *v.* CREWE.

Trinity Term.

It is doubtful whether an agent to let a house has an implied general authority to let persons into possession, but slight evidence will be sufficient to show an *express* authority.

ACTION for entering the plaintiff's house and expelling him therefrom, seizing his fixtures (gas fittings), &c.

Pleas: not guilty and not possessed.

Hayes, Serjt., for the plaintiff.

Petersdorff, Serjt., for the defendant.

The defendant was the *owner* of the house, and had instructed one G., a house agent, to let it. He had agreed with the defendant to let it to him for three years from the 29th of September, 1859, at a certain rent (*a*), and had let him into possession *before* the 29th September.

On the 30th September, an agreement in writing for a demise for three years, *from the 29th* (*b*), was sent to the plaintiff for signature, but which he declined to receive, as it contained stipulations for repairs, &c., which he contended were not in the parol agreement.

The defendant, thereupon, after desiring him to withdraw, turned him out, and this was the trespass complained of (*c*).

There was a contest of evidence between G. (who was

(*a*) By the Statute of Frauds, "all leases * * * made by parol and not put in writing, and signed by the parties so *making* the same, or *their agents*, thereunto lawfully *authorized by writing*, shall have the force and effect of leases at will only, except that leases *not exceeding* the term of *three* years *from the making* thereof, &c. And by 8 & 9 Vict. c. 106, s. 3, a lease required by law to be in *writing* shall be void (after 1st Oct., 1845) unless made by *deed*, which would require that, if made by an agent, he should be authorized by *deed*. But these acts only apply to leases *exceeding* three years from the *making*.

(*b*) Which, coupled with possession, would be a present demise, (subject to the statutes, *vide supra*, note (*a*),) and perhaps even without possession; *Doe* d. *Pearson* v. *Ries*, 8 Bing. 178.

(*c*) For which the plaintiff was entitled to sue unless his possession was unlawful, which it was, if it were only on sufferance, or at will; *Brown* v. *Dawson*, 12 A. & E. 624.

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called for the plaintiff) and the defendant, as to the instructions given to G. by the defendant, and in particular, whether the defendant had given him the agreement to show the plaintiff before he was let in.

But the defendant admitted, that after telling the plaintiff that he was to sign the agreement, he allowed the plaintiff to send the workmen in to put up gas-fittings (*a*).

POLLOCK, C. B.—Is there any authority showing that the general principle of law applying to agents for the sale of goods does not apply to agents for the sale or letting of lands; viz., that if they are known in and carry on the business, their acts in the course of their employment bind their principals, even although beyond their express authority?

No such case being cited (*b*), but *Fuller* v. *Wilson* (*c*) being cited,

POLLOCK, C. B.—In regard to the sale of goods, if a horse dealer send his servant to market to sell a horse, and the servant, contrary to his authority, *warrants* the horse, the dealer will be bound by it, and so if he sells on credit, though told to sell for cash (*d*). *Fuller* v. *Wilson* (*e*) hardly concludes the point whether this principle is applicable to agents for the letting of lands, though it goes some

(*a*) Which would have sufficed to make the plaintiff liable to the defendant for use and occupation; *Smith* v. *Twoart*, 2 M. & G. 841; "for, unless the defendant was a tenant, he was a trespasser." *Per* MAULE, J., commenting on that case, 22 L. J., C. P., 219.

(*b*) It is believed that there are none such; unless it be the case where it was held that an *indebitatus* count could not be maintained for *land bargained and sold*, because land does not pass by mere sale; *per* PARKE, B., *Hullen* v. *Rundle*, 1 C. M. R. 271. But that does not apply to a lease *not exceeding* three years; *vide supra*, p. 59, n. (*a*).

(*c*) 3 Q. B. Rep. 58.

(*d*) So stated by CRESSWELL, J., *Riches* v. *Coleman*, 24 L. J., C. P. 131. In *sales* of land, usually by auction, the *conditions* of sale of course limit the authority of the agent to the knowledge of the purchaser, so that the point could scarcely arise; *vide* p. 50, n. (*a*).

(*e*) There a landlord, it was held, might be bound by the warranty of a house agent.

way towards it. (To the jury.) Substantially, the question for you is whether the plaintiff became tenant to the defendant by what passed between him and the defendant's agent. The authority of an agent in many cases goes beyond his *actual* authority, as in the cases I have mentioned; and so in many other cases, where an agent, exceeding his private instructions, nevertheless binds his principal. It would be more satisfactory to be able to base my ruling upon some decided case, applying this principle to the case of an agent for the letting of land, for, if it did apply, then clearly, whatever the directions of the defendant to his agent, the defendant would be bound by the act of his agent in letting the plaintiff into possession on certain terms. But here it will be safer to ask you whether the defendant *actually* authorized his agent to let the plaintiff into possession, or sanctioned his being let into possession, without or before his agreeing to the terms he embodied in the written agreement? If so find for the plaintiff.

Verdict for the plaintiff.

Westminster, coram Hill, J.

MACKLEY *v.* PATTENDER.

Trinity Term.

EJECTMENT for leasehold premises.

The plaintiff claimed *under* assignees of a bankrupt (*a*);

In an action, *not* by a person claiming under the assignees of a bankrupt against a third party, the proceedings in bankruptcy must be taken as conclusive, if either admitted or proved in evidence; and the validity of an order for sale under which the plaintiff claims property of the bankrupt, or of a debt, before and as proof of which he has obtained it, cannot be disputed?

But *quære*, as to what evidence of assent by assignees to take a leasehold is sufficient.

(*a*) Therefore the case was not within the rule 5 H. T. 1853 (following the 12 & 13 Vict. c. 106, s. 234): "In all actions *by and against* assignees of a bankrupt, &c., the character in which the plaintiff or defendant is stated on the record to sue or to be sued, shall not in any case be considered as in issue unless *specially* denied." As to which, and the notice required by the statute, see *Hernimann* v. *Barker*, 23 L. J., C. P. 145.

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MACKLEY v. PATTENDER.

the defendant was the bankrupt's widow, who had gone into actual possession and occupation after his death (in 1858), and had not paid rent.

There had been the following admission, signed by the defendant's attornies. "We agree to admit that W. P. was duly declared and made a bankrupt on, &c., and we agree that no *further evidence of the proceedings* shall be deemed necessary, on the trial of this cause, beyond this admission and the production of the file of proceedings."

The file of proceedings was accordingly put in by the plaintiff.

The lease had been deposited by the bankrupt with the plaintiff under an equitable mortgage, in 1846, before his bankruptcy.

The adjudication was the 15th August, 1847.

The bankrupt died, February, 1858.

The widow soon after went into occupation.

There was an order for sale on the 19th May, 1859.

And now, under the order, there had been an assignment to the plaintiff.

M. Chambers, for the defendant, objected that the proceedings in bankruptcy were not evidence against her; but

HILL, J., held this objection answered by the admission, which was not accompanied by any condition.

M. Chambers next contended that the defendant was tenant from year to year; but

HILL, J., held that this was not so, as she had not paid rent (*a*).

M. Chambers then objected that there was no evidence that the assignees had taken to the lease (*b*).

(*a*) *Braithwaite* v. *Hitchcock*, 10 M. & W. 494; 12 L. J., Exch. 38.

(*b*) See *Valpy* v. *Saunders*, 5 C. B. 886; 17 L. J., C. P. 249. The assignees might have been made to elect by the equitable mortgagee; *Ex parte Hanbury*, 12 L. J., Bank. 43; but slight evi-

Shee, Serjt., submitted that there could not be a stronger evidence of assent than the dealing with the property by selling it to the plaintiff; but

HILL, J., doubting,

Shee, Serjt., tendered evidence that in 1850 the bankrupt let the house, and that the rents had been accounted for by him to the plaintiff, the equitable mortgagee, under *the authority of the assignees*, which evidence having been admitted and given,

HILL, J., held the evidence of assent sufficient, but reserved the point.

M. Chambers then tendered evidence that the plaintiff had been paid off by the bankrupt, and that the debt was to a great degree colourable, and the transaction as between him and the bankrupt fraudulent; but

HILL, J., refused to receive the evidence, holding that the remedy was by the Court of Bankruptcy (*a*), and that in this action the proceedings in bankruptcy must be taken as conclusive (*b*).

The learned JUDGE thereupon directed a verdict for the plaintiff (*c*).

dence of an executor's assent will suffice; *Tudor* v. *Guest*, 27 L. J., Ex 395.

(*a*) As in *Ex parte Flood*, 24 L. J., Bank. 1; 5 De Gex, M. & G. 398, where an assignee appealed on the very question of an order for sale of part of the bankrupt's effects.

(*b*) *Aliter*, in actions by or against *assignees*; such actions being between assignees and *third parties*, and in which, therefore, the proceedings in bankruptcy are not conclusive; and not only does the Bankrupt Act (*vide supra*, p. 61) make special provision for disputing the debt or trading, &c., but apart from that, the proceedings may be disputed, as, for example, an order for sale, which does not bind the true owner; *Graham* v. *Furber*, 14 C. B. 134; *S. C.* 23 L. J., C. P. 10.

(*c*) Subject to the point reserved. *M. Chambers* was considered to have tendered a bill of exceptions on the other points, but leave to move was given only on the point mentioned as reserved.

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WESTERN CIRCUIT.

Devizes, coram Martin, B.

THE QUEEN *v.* MANZANO.

The prisoner, in a case of murder, allowed to make a statement to the jury as to how he became possessed of the clothes.

THE prisoner was charged with the wilful murder of Anastatia Ironbridge. The principal evidence against the prisoner was the possession of clothes within a few hours after the murder, identified by the prosecutor as being in his house, on the morning of the murder.

At the conclusion of the evidence for the prosecution,

H. T. Cole (with whom was *W. Major Cooke* for the prisoner) applied that, before he addressed the jury, the prisoner might be allowed to make a statement to the jury as to how he became possessed of the clothes.

Edwards for the prosecution, said, the course was unusual.

MARTIN, B., retired to consult CHANNELL, B., and on his return said, that the case that had been cited, *The Queen* v. *Martin*, 8 C. & P., was entirely opposed to another case in the same Vol. of Reports on the same subject. That although he was entirely opposed to the practice of allowing the prisoner to make any statement to the jury, when the prisoner was defended by counsel, yet, as there was a precedent, both Baron CHANNELL and himself agreed, in a case of such importance as the present, the prisoner should be allowed to make any statement he desired. He however considered it a bad practice, requiring, as it did, the Judge to make comments on the

prisoner's statement (perhaps adverse to him), inasmuch as the counsel for the prosecution had no right of reply.

The prisoner made a statement,

And was found guilty (*a*).

(*a*) The statement of a prisoner at the time of the transaction, or of his arrest, will be admissible in his favour, and if a declaration of his is put in on the part of the prosecution, of course the *whole* must be looked at, and anything in his *favour* will be considered by the jury as part of the evidence. And the prisoner had always, at common law, and if he had, counsel has now, a right to address the jury and make any statements of the facts he pleases, (running the risk of its being in accordance with the facts proved by witnesses,) in order to raise a defence, by suggesting any reasonable hypothesis consistent with innocence. Nor does there seem any reason why his *counsel*, if he have any, should not be in the same position, and practically they *are* so, and do suggest, by way of hypothesis, views of the facts, which it is understood are derived from the statements of the prisoner. [Nothing *sworn* by the prisoner can be admissible for or against him, *R.* v. *Pikesby*, 9 C. & P. 124, so that it is not as matter of evidence, otherwise than as admissions, that any statements of his are receivable.] But then, strictly speaking, when a man has counsel he has no *right* to address the jury, and hence the decision of the learned Judges in the above case; which, on the one hand, it is conceived consistent with legal principle, was in that view, rather as to a matter of indulgence, because the prisoner had counsel. If he had defended himself, he could certainly have made any statement he pleased; and so could his counsel for him. But they probably thought it would have more force, coming directly from *him*. See *R.* v. *Haines*, Vol. I. p. 86, and *R.* v. *Powell*, Car. & Mar. 500; *R.* v. *Christopher*, 1 Den. C. C. 536; 2 Car. & K. 994; 19 L. J., M. C. 103.

1860.

Westminster, coram Cockburn, C. J.

TOLMAN AND WIFE *v.* JOHNSTONE.

Trinity Term.

A defendant, charged with an indecent assault, having been cross-examined as to alleged indecencies as to other persons, and denied them, evidence in disproof of these imputations on one side, or in support of them on the other, was rejected, as relating to issues quite collateral; the plaintiff being bound by the defendant's answers as to these collateral matters.

ACTION for an assault upon the wife.

Plea: not guilty.

Huddlestone and *Phipson* for the plaintiff.

Ballantine, Serjt., and *Henniker*, for the defendant.

The assault sworn to by the wife was of an indecent character. The defendant was called, and denied it. On cross-examination he was asked as to alleged indecent assaults on some young persons, and these also he denied.

Ballantine, Serjt., tendered evidence to disprove these imputations.

Huddlestone objected, unless he also was allowed to adduce evidence in support of them.

COCKBURN, C. J., considered that such evidence on one side or the other was inadmissible. He, however, took time to consider and consult the other Judges, and then said, We are all of opinion that the evidence is not admissible, the matter inquired into being quite collateral to the issue to be tried; so that the plaintiff is bound by the answers given by the defendant on cross-examination (*a*).

Ultimately

Jury discharged.

(*a*) See *Palmer* v. *Trower*, 22 L. J., Exch. 32.

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Trinity Term.

WHITTY *v.* LORD DILLON.

ACTION for work and labour as a valuer.

Plea: never indebted.

Edwin James and *T. Atkinson* for the plaintiff.

Pigott, Serjt., and *Field* for the defendant.

The defendant having told the plaintiff, a land surveyor, that he was tenant for life of an estate, and wanted to sell the timber on it, every stick of it, engaged him to value it roughly, at a certain rate per cent., and then gave him a written order to that effect, signed only by himself. The witnesses on both sides agreed that timber ordinarily meant trees of a certain growth, and the valuation included mere saplings, so that it did not show the value of the timber:—*Held*, that there was nothing to show that the word timber was not used in its ordinary sense, and that, therefore, the jury might find the valuation worthless.

The defendant, tenant for life of an estate, sent for the plaintiff, a land surveyor, and told him, that being only a life tenant, he desired to sell the timber upon it; and wished, therefore, for a "rough valuation of it," an "approximation" to the actual value, with the intention of selling "every stick" of the timber. The plaintiff agreed to make such valuation at one and a half per cent. (having stated that an accurate valuation would be two per cent.), and to this the defendant assented. The plaintiff then asked for a written order, which the defendant gave in these terms (*a*):—

"Please value the timber on my estate, at the rate of one and a half per cent. on the gross valuation."

This was written and signed by the defendant alone.

The plaintiff made and delivered to defendant a valuation, headed thus:—

"Approximate estimate of the value of the *timber*, *&c.* (*sic*) on the D. estate.

"The prices in the estimate are for the timber as it stands, and they have been carefully prepared with the present prices of the market; so that they are neither too low for the seller nor too high for the buyer.

"The soil is not fit for timber, so that the clearance of the ground will be a benefit to the estate."

(*a*) This being, in the defendant's handwriting, assented to by parol, (even if it contained the entire terms of the contract,) was it, *per se*, a *contract*, so that the *contract* was in writing within the Stamp Act, however it might have been a note or memorandum in writing "signed by the party to be charged" within the Statute of Frauds? See *Hegarty* v. *Milne*, 23 L. J., C. P. 151.

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The valuation then followed, arranged in double series of columns, classing the various *trees* as "large" and "small," but there were no figures under the head "small," and in point of fact the plaintiff's assistant, who had made the valuation, admitted that the small and large trees were counted together, down to mere saplings. There were separate headings for "poles" and "underwood," but the plaintiff admitted that saplings were not either poles or underwood, neither were they timber, in the strict and proper sense of the term, but he contended that they came within the meaning of the plaintiff's order, as given to him.

One of the witnesses for the plaintiff stated that "timber" meant strictly trees of six inches diameter or two feet in girth (allowing for the irregularities of shape), and that a simple order to "value the timber" on an estate would be so construed, but that if he received such an order as the plaintiff had received in writing he should have asked an explanation, and on receiving such an explanation as was afforded by the accompanying conversation, he should have "valued everything down to 6*d*." (the plaintiff did not appear to have valued anything among the trees lower than 1*s*. or 1*s*. 6*d*.)

For the defendant witnesses were called, who gave the same definition of timber, but stated that if the conversation recounted by the plaintiff had taken place, they should have deemed themselves only entitled to value *timber* properly so called.

Pigott, Serjt., submitted that, when he had shown the sense in which the word timber was generally understood, no parol evidence could be allowed to affect the written order, which he contended contained the terms of the contract, and could not be varied by parol (*a*).

(*a*) It is in that way that evidence is admissible to show the sense in which particular terms are generally understood in trade; *Sotilichos* v. *Kemp*, 3 Excb. Rep. 105.

COCKBURN, C. J.—There may be great doubt as to that, and I am not aware that I should be able to say what is the meaning of the word "timber," or that it has any legal meaning, as regarded a particular size of wood, unless evidence were given to show the sense in which the word is *generally* used (*a*); when *that* is ascertained, then arises the question (*b*), whether the parol evidence of the plaintiff as to the conversation which took place between him and the defendant should be allowed to *control* the sense in which the word is usually understood. Now, as to that, I do not see that the plaintiff's evidence at all varies the sense in which, according to the defendant's evidence, the term "timber" is usually understood. For the tenant for life could properly only cut timber, and the phrase "every stick," may have meant every "stick of timber."

The case for the defence was, that the valuation was not a valuation of timber at all; that it was not what the defendant had desired and ordered, and that not only on that account but also as being grossly incorrect, it was wholly worthless, and was rejected as being so.

Upon that latter point the evidence for the defendant was strong, showing that in all the instances tested the valuation was wrong to the extent of forty or fifty per cent., while the defendant's skilled witnesses agrees, that even a "rough estimate" to be of any value at all, should be within ten per cent. of the true value.

(*a*) See *Smith* v. *Margetson*, 11 Q. B. 23. Just as similar evidence is necessary to fix the sense in which a cant term is understood among those with whom it is current. *Daines* v. *Hartley*, 18 L. J., Exch. 85; *Barnett* v. *Allen*, 27 L. J., Exch. 412, and Vol. I. p. 125.

(*b*) This is a question quite distinct, (as the Chief Justice pointed out,) from the question, whether the sense in which the word is so usually understood is the sense in which it was used on the *particular* occasion; and therefore is independent of the distinction between oral and written language, and is not affected by the rule of law against altering writing by parol, which allows of *a latent* ambiguity being *cleared* by oral evidence. See also *Lockett* v. *Nicklin*, 2 Exch. Rep. 111.

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After the case was closed the defendant was not called.

COCKBURN, C. J. (to the jury).—The great question is, what is the meaning of the word "timber" as used by the parties? Now, as to that, even taking the plaintiff's evidence as to the expression used by the defendant prior to the written order, they do not appear to me to vary the terms of that order at all. It could scarcely be fairly intended that a tenant for life should strip the estate of every particle of wood; the fair and probable inference, therefore, from the defendant's informing the plaintiff of the fact, that he was tenant for life, is rather that he meant only timber properly so called to be cut. And as to the sense in which the word is ordinarily understood, both the defendant's witnesses and the plaintiff's are agreed. Taking that, then, to be the sense in which the word was understood—if you think it was so understood by the parties—then the defendant has not had what he ordered; for in this valuation the saplings are mixed up with the trees, the small trees with the large, so that the defendant cannot tell from this valuation what is the value of the *timber* he could cut. If you think so, then find for the defendant. And even if you think otherwise, on that point, there is another ground on which the defence is rested, viz., that the valuation was so grossly incorrect as to be of no value at all. If you think so, find for the defendant. Did the defendant leave the plaintiff to understand that the *whole* of the wood was to be valued, or only the *timber* properly so called? And even if he did, was the valuation such as he might reasonably expect, or was it so bad as to be worthless?

Verdict for the defendant.

1860.

Westminster, coram Erle, C. J.

PARIS *v.* LEVY.

Trinity Term.

The plaintiff in an action of libel, complaining of comments in a newspaper upon a handbill he had issued, offering prices for kitchen stuff, &c., left-off apparel, &c., the jury were told that the publication of the comments was excused, if they were of opinion that they were fair and well-founded, and did not go beyond the subject of the handbill.

This was an action for libel, published in the "Daily Telegraph," as follows:—

"ENCOURAGING SERVANTS TO ROB THEIR MASTERS. — Alderman Humphery, at the close of the public business, drew our reporter's attention to the following extraordinary handbill, which, he said, had been extensively circulated in the neighbourhood of Clapham—a system which he stigmatized as most pernicious in its effect, as offering great inducements to servants to rob their masters and mistresses. He mentioned the matter in order that the publicity of such an insidious proceeding might put the masters on their guard against such practices. The handbill contains such a number of unheard-of perquisites that we give it *in extenso*:—

"'No Monopoly!

"'J. E. Paris, wholesale and retail rag merchant, begs to inform the public that, in consequence of another rise in the market, he is enabled to give the following high prices:—2½*d.* per lb. for kitchen stuff; 4*d.* per lb. for dripping; one halfpenny per lb. for bones; 3*d.* per lb. for white cuttings; 2½*d.* per lb. for white rags; 1½*d.* to 2*d.* for dirty white rags; 3*d.* to 4*d.* per lb. cloth cuttings; 1½*d.* per lb. old cloth; ½*d.* to 1*d.* per lb. for mixed rags; 1*d.* per lb. for tailors' cuttings; 6*d.* per lb. for brass; 8*d.* to 9*d.* per lb. for copper; 7*d.* to 8*d.* per lb. for pewter; 1½*d.* per lb. for lead; 1¼*d.* per lb. zinc; 1*s.* per lb. for plated metals; 7*d.* to 9*d.* per lb. for horse-hair; 10*d.* to 1*s.* per lb. for wax and sperm candle ends; 3½*d.* per lb. for tallow candle ends; ¼*d.* per lb. for broken flint-glass. The highest price given for wine, beer, soda-water, ginger-beer, and doctors' bottles. Hare and rabbit skins bought. The highest price given to dealers in the trade. Ladies' and gentlemen's left-off wearing apparel and old boots and shoes bought to any amount. Tailors' and upholsterers' shops cleared. *Any of the above articles sent for*, if required, from any distance, at the shortest notice. False bottoms, cheeks and backs for stoves, flat-irons, &c., at the lowest price.

"'Please to observe the name and address, No. 3, Bromell's Passage, High Street, Clapham, near the Plough Inn.'"

The defendant pleaded not guilty.

Ribton and *Lawrence* for the plaintiff.

Edwin James, Q.C., and *Smith* for the defendant.

The plaintiff was a marine-store dealer, carrying on business at Bromell's Passage, Clapham, and he com-

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PARIS v. LEVY.

plained of two libels that had been published in the "Daily Telegraph." In the early part of September the plaintiff published a printed handbill in reference to his business. The defendant was the proprietor of the "Daily Telegraph." In September Mr. Alderman Humphery took occasion, when presiding at the Guildhall Police Court, to draw attention to the handbill in question; and on the 14th September there appeared in the "Daily Telegraph" the paragraph which was the subject of the present action.

To prove the publication a witness was called, who produced a copy of the declaration filed at Somerset House of the ownership of the paper being in the defendant, and had made a copy of the declaration by order of the plaintiff's attorney.

John Ellis Paris, the plaintiff in the action, had purchased a copy of the "Daily Telegraph," of the 14th September, and also one of the 15th, and gave them to his attorney. They were not in Court. They were in his attorney's possession last night, but plaintiff believed he had since lost them.

Lawrence proposed to put in copies of the libels.

James objected to the reception of secondary evidence.

Ribton then called a clerk to the plaintiff's attorney, who said, he gave me the whole of the papers in this case. Last night I went round to subpœna the witnesses, and read the libels to them. On my return home I lost both the papers containing the libels.

Ribton submitted he had given evidence that entitled him to give secondary evidence of the libels.

James still objected.

The witness was recalled, and, in answer to questions put by the learned Judge, said he was conversant with these matters, and had made the necessary inquiries with reference to the proprietorship, and who was the registered printer and publisher of the "Daily Telegraph."

ERLE, C. J., said he would receive the secondary evidence (*a*) and give *James* leave to move.

Ribton, before giving secondary evidence, called the defendant's solicitor, who had copies of the papers in Court, but he had not been subpœnaed by the plaintiff to give evidence, and he declined to produce the paper.

ERLE, C. J.—Has that document you have brought into Court come into your possession as the defendant's attorney, and do you hold it as such for his interest?—Witness: Yes, my Lord.

ERLE, C. J.—Then, my opinion is that the witness has no right to produce the papers as between himself and client (*b*).

Ribton.—Does your Lordship hold that the copy of the papers is in the nature of a private communication between the attorney and his client?

ERLE, C. J.—As at present advised, the attorney for the defendant having possession of the document, for his client's use, he is not liable to be called on to produce his papers and lay them open to the other side.

Secondary evidence of the libels was put in and read.

But afterwards a clerk in Somerset House produced a copy of the "Daily Telegraph" of the 14th, and also the 15th September, containing the alleged libels. The copies were put in.

The plaintiff was then recalled, and said he was a rag merchant and marine-store dealer, carrying on business at Clapham, and dealt in the articles enumerated in the hand-bill. The bill produced was first put into circulation be-

(*a*) See *Baker* v. *Wilkinson*, 1 Car. & M. 399. See also *Boyle* v. *Wiseman*, 24 L. J., Exch. 284.

(*b*) *Coates* v. *Birch*, 11 L. J., Q. B. 1; 2 Q. B. Rep. 252. In *Dwyer* v. *Collins*, 21 L. J., Exch. 225.

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fore the 14th September last. The prices in the handbill are fair and reasonable ones for the articles named.

Cross-examined: He admitted that he sent to gentlemen's houses for the stuff, if required to do so. He denied that his bill was addressed to servants, but could not mention the name of one gentleman who sold him dripping, or any article mentioned in the bill. And he admitted that he had sent to gentlemen's houses to the servants for wax and sperm candle ends, and that he purchased pewter at 7*d.* to 8*d.* per pound.

Edwin James, for the defendant, contended that the alleged libel was in the nature of fair comment upon observations in a Court of justice, and as such privileged, and cited *Lewis* v. *Levy* (*a*).

ERLE, C. J. (to the jury).—I need do no more than refer you to the articles, to show that the articles are defamatory and tended to bring the plaintiff into ridicule and contempt; for they impute to the plaintiff that he gave great facilities for dishonest servants to bring the fruits of their dishonesty to a profit, and that he holds out great temptations and encouragement to servants who are wavering on the line dividing honesty from dishonesty, to step over and become dishonest. But then the plaintiff is not entitled to recover your verdict for defamation unless he establishes that the defendant was actuated by malice. The law, however, does not require that the plaintiff should show personal malice or ill-will in the sense of private hatred, but that the defamatory publications were published without any of those causes which the law considers will justify them; such causes excuse the publication because they show that the party was not actuated by any corrupt or malicious motive in saying that which tends to defame the character of another. There are many actions well known to the law which justify the use of defamatory

(*a*) 27 L. J., Q. B. 282.

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words, on the ground that malice is negatived. In criticism, on matters which have been published by the complaining party, Lord ELLENBOROUGH laid down, in a case where a journal had criticised books that had been published dangerous to morality, that "Liberty of criticism must be allowed, or we should neither have purity of taste or of morals. That publication I shall never consider as a libel which has for its object not to injure the reputation of any one, but to correct misrepresentations of fact, or to censure what is hostile to morality" (*a*). If you find, therefore, your verdict for the defendant, it must be on the principle so laid down. The plaintiff says that in this case the defendant has not excused the publication. The plaintiff says that he carries on a lawful trade, and that there was nothing in his handbill that held out to the world that he will connive at or sanction dishonesty in any way. The defendant, in his articles, says that the handbill so disseminated has the tendency that he has imputed to it, and it appears to me that your consideration will be confined entirely to the application of the principle I have mentioned. The article with reference to Alderman Humphery has nothing added by the editor to the remarks of the magistrate; and in the article of the 15th, in which the tendency is imputed, I can find no single word directly or by implication disrespectful to the plaintiff as a private individual or as a member of society. I do not find a word said against him as an individual stepping aside from the honest part of the community, and wilfully going with the dishonest, or going beyond the tendency of the handbill; but, had the defendant said one word against him with reference to the plaintiff's private life, or his mode of managing his business, I should have felt myself bound to say there was no excuse of publication. Then, if Paris puts forward a handbill, and draws public attention to it,

(*a*) *Vide Hibbs* v. *Wilkinson*, Vol. 1. p. 606, where the passage was cited and acted on by the same learned Judge.

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which, in the opinion of the editor, is most dangerous to honesty, and holds out a temptation to servants to depart from their duty, it may be the editor will be able strictly to excuse before a jury the remarks he has made, if in their judgment they are well founded and wholly applicable to it. If you consider the handbill issued by the plaintiff has the dangerous tendency attributed to it by the defendant, then the editor has done that which may be salutary for the community in preventing such encouragements being given, and that he has not been actuated by malice against the plaintiff, but from a desire, founded on the principles of fair dealing and honesty, to prevent such temptations being held out to dishonesty.

Verdict for the defendant.

Coram Bramwell, B.

GOSTLING *v.* BROOKS.

Trinity Term.

The defendant having said of a trader in his shop, before customers, that wholesale dealers were going to close their accounts with him and to shut him up:—*Held*, that it was for the jury, whether these words imputed actual or likely insolvency.

ACTION for slander on the plaintiff as a trader; the words laid being, "A., B. and C. have closed their accounts with you; and we are going to shut you up."

Inuendo, that the plaintiff was insolvent, or likely to be so.

Plea: not guilty.

M. Chambers and *Robinson* for the plaintiff.

Tozer, Serjt., and *T. Jones*, for the defendant.

There had been dealings between the defendant, a wholesale manufacturer, and the plaintiff, a retail dealer, and the former had applied repeatedly for his account; and at last, irritated by the delay, had used some language to the plaintiff in his shop, and before one or two customers, as to which both the plaintiff and defendant gave contradictory evidence. The plaintiff swore to the words as laid. The defendant swore that he only said that A.,

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B. and C. were about to close their accounts, by reason of the plaintiff's delay in his payments; and he denied that he said the plaintiff would be "shut up." He also swore (and this seemed to be conceded), that he had no *intention* to impute insolvency; but, on the other hand, the plaintiff and his witnesses gave evidence to show that the imputation was understood to point to insolvency.

For the defendant it was urged that the words only meant that the wholesale houses would not deal with the plaintiff.

BRAMWELL, B., left it to the jury whether the words were spoken with the meaning ascribed to them in the declaration, telling them that if so they were libellous (*a*).

Verdict for the plaintiff (*b*), damages 50*l.*

(*a*) See *Brown* v. *Smith*, 22 L. J., C. P. 151.

(*b*) Upheld *in banco*, but the damages reduced there having been no evidence of substantial actual damage or of actual malice.

Coram Martin, B.

CHITTENDEN *v.* DAY.

Trinity Term.

TROVER by the plaintiff as assignee of one Grainger, an insolvent.

Pleas: not guilty and not possessed.

The defendant had seized Grainger's stock under a bill of sale to him, which the plaintiff contended was fraudulent as against creditors.

Francis, for the defendant, tendered in evidence the following documents:—

"I, J. Day, do hereby agree to let J. Grainger have the use of the whole of the things I purchased of him as per receipt dated October 6th, 1857, in consideration of which

A memorandum stamped as a receipt having been rejected, because requiring a stamp as an agreement, an agreement for the hire of goods of which the value was mentioned only by reference to the *receipt*, was held not to require a stamp, the value of the hire not appearing to exceed the amount of 10*l.*, and the rejected receipt allowed to be looked at, with reference to the real date of the transaction, and in order to show fraud.

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he is to pay me 10*s.* per week, such payments to become due, &c. And he also agrees to give up the articles mentioned in the receipt in good working order," &c.

The receipt referred to was in these terms, and had a *receipt* stamp only:—

"Received of J. Day 100*l.*, being part payment of 170*l.*, for seven horses, nine vans, &c., which J. Day agrees to let me use, free of expense, until December, when the balance of the purchase-money is to be paid."

The receipt was rejected as containing an *agreement*(*a*); and

M. Chambers objected that the subject-matter of the *agreement*, by reference to the receipt, appeared to be of the value of 20*l.* and upwards, and required a stamp (*b*).

MARTIN, B., consulted the Judges, who were sitting in an adjoining chamber *in banco*, and said that they were not agreed that the document (which must be looked at by itself) required a stamp, and therefore he should rule that it did *not* require one.

M. Chambers, in cross-examining the defendant, pressed him as to the *date* of the transaction—referring to the receipt with that view—

Francis objected, the receipt having been rejected; but

MARTIN, B.—It may nevertheless be looked at for a collateral purpose, as to show fraud. It has been often so held (*c*).

Verdict for plaintiff.

M. Chambers and *Gibbons* for the plaintiff.

(*a*) *Von Dedalzen* v. *Swann*, 20 L. J., Exch. 50.

(*b*) See *Lloyd* v. *Mansell*, 19 L. J., Q. B. 192; *Semple* v. *Steinau*, 8 Exch. 622; that the subject-matter would mean, not the goods, but the *hire*.

(*c*) *Williams* v. *Geary*, 10 M. & W. 296; *Holmes* v. *Sixmith*, 21 L. J., Exch. 312.

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CLARK *v.* HOLMES.

Trinity Term.

Where the acceptor or other party sued upon a bill of exchange pleads only that it was given for goods not delivered, or for some other consideration which has failed, the defendant has a right to begin, but the whole *onus* of proof is upon him, and he is bound to satisfy the jury that the goods have not been delivered, or that the consideration has failed *in toto*, and if he does not prove this, except as to part, the plaintiff recovers for the rest.

ACTION on a bill of exchange drawn by the plaintiff, dated 24th April, 1854, and accepted by the defendant, for 99*l.*, "for value of goods received."

Plea: that the defendant accepted the bill on the faith of receiving certain goods which the plaintiff promised to sell and deliver to him at the time of the acceptance, and the sale and delivery of which goods were the consideration for the said acceptance; but no part of the goods have been sold or delivered to the defendant, and there never was any value or consideration for the acceptance or payment of the bill by the defendant. Issue.

Day, for the defendant, claimed, and was allowed, the right to begin, and called the defendant, who admitted that he had received goods to the value of 11*l.*, but swore positively that he had received no more from the plaintiff, although the bill was given for goods to the amount of 99*l.*, which were to be delivered.

M. Lloyd, for the plaintiff, called the plaintiff and his foreman to prove orders of goods by the defendant to that amount, some of which they swore he took away, and the rest were packed up ready for delivery to him, and they believed had been so delivered, but in consequence of the lapse of time they could not speak positively of the actual delivery of all.

The goods admitted to have been received by the defendant had not been returned.

Day, upon this, claimed the verdict, contending that, as the contract was an entire one, and had not been fulfilled, the plaintiff could not recover on the *bill* (*a*); but

MARTIN, B.—The action is an undefended one as to

(*a*) See *Stone* v. *Rogers*, 2 M. & W. 443; *Wells* v. *Hopkins*, 5 M. & W. 7; *Trickey* v. *Larne*, 6 M. & W. 278.

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11*l.* And as to the rest, the *onus* is upon the defendant of satisfying the jury that he has not received. You should give, therefore, a verdict for the plaintiff for the whole amount, deducting only the price of such of the goods as you are satisfied were *not* delivered. For the bill itself is *primâ facie* proof that the whole were delivered, and that there was consideration for the whole amount.

Verdict for the plaintiff for 11*l.*

Coram Cockburn, C. J.

OLDFIELD *v.* PRICE (Secretary of the General Fire Assurance Company.)

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Semble, that an action may be maintained by a person insured from fire against the insurers for taking and keeping possession, for an unreasonable time, of his premises, and the salvage after a fire. But held, that a plea of payment into Court as to the trespasses up to a certain time, admitted that up to that time the defendants were trespassers.

DECLARATION, that the Company, on divers days and times, broke and entered the house and shop of the plaintiff, and ejected him therefrom, and kept him so ejected for a long time, and seized his goods, by means of which he was prevented from carrying on his business, &c.

Pleas: 1. As to the trespasses to the house and shop after the 25th March, 1858; not guilty.

2. (To the same.) Not possessed.

3. (To the same.) Leave and licence.

4. (To the same.) As to the trespasses after the 25th March; that, before action, the defendants satisfied and discharged the plaintiff's claim by entering into an agreement of reference to arbitration of matters in difference between the plaintiff and the Company, and by performing the award made under the submission, and paying divers sums, &c., which the plaintiff accepted in satisfaction and discharge of the causes of action pleaded to.

5. As to the residue of causes of action, (i. e. before the 25th March;) payment into Court of 25*l.*; to which the plaintiff replied that it was not sufficient to satisfy the causes of action pleaded to. Issue.

Parry, Serjt., and *Joyce* for the plaintiff.

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Hawkins and *J. T. Clark* for the defendants.

In 1858, the plaintiff's stock, &c., was insured, but the policy, though it gave the Company an option to reinstate, was silent as to any right to take possession of the premises.

In February, 1858, a fire occurred on the premises.

In March, the firemen took possession of the premises and the salvage, and kept possession until 7th October.

The plaintiff admitted, in cross-examination, that he had given notice to leave the premises at Lady-day.

In April, the plaintiff's claim, which was for a total loss of the stock, &c., was sent in, and referred to arbitration, and in January, 1859, an award for a large amount was made.

It did not appear that the plaintiff had demanded possession of the premises before October, or that he had made any claim before the arbitration in respect of the causes of action now sued for.

Hawkins submitted that the action could not be maintained, and cited *Hartley* v. *Moxhay* (*a*).

Parry, Serjt., contended that there was no right on the part of insurers to enter upon the premises without the leave of the insured, and possess themselves of the premises and salvage; or that, if there was any such right, it could only be for a reasonable time, and that here the defendants had retained possession for a long and unreasonable time (*b*).

(*a*) 3 Q. B. Rep. 701.

(*b*) Probably the latter would turn out to be the correct view. There are many instances of licences in law, apart from any custom; as, for example, the licence of a landlord to go on the demised premises to demand his rent, or the creditor to demand payment of his debt; and there are many agencies or authorities in law arising out of *necessity;* as that of the captain to sell or sink the cargo of a ship; *Vlierboom* v. *Chapman*, 13 M. & W. 230. In the Year Books will be found cases of authority in law to pull down a neighbour's house, when on fire, to prevent the fire from spreading; and there would probably be an implied licence in

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COCKBURN, C. J.—The question whether such an action can be maintained does not arise in this case, for there is no plea as to the time *before* the 25th March, except payment into Court, which being specifically applied to all the days before that date, admitted trespasses on those days (*a*), and leaves it a mere question of damage. But if it were not so, I shall not determine now, for the first time, that the action will not lie.

For the defendant, the arbitrator was called to prove that the plaintiff had claimed the full value of the goods, from which was deducted the value of the salvage he had

law to the insurance company to enter and temporarily occupy the premises for a similar purpose, and perhaps for the purpose of salvage. But whether to exclude the owner or not would be a more difficult question. For it is a question whether, even under a distress, the landlord can *exclude* the tenant from the premises; *Woods* v. *Durrant*, 16 M. & W. 149; 16 L. J., Ex. 313. A sheriff staying in possession too long under a *fi. fa.* is liable in trespass; *Ash* v. *Dawnay*, 8 Ex. 237. In the present case the declaration charged an expulsion, and the plea up to the 25th of March admitted an expulsion, *vide supra*, p. 80; and, as to the period beyond that date, the defendants relied on the doctrine that a tenant once expelled, and his interest having terminated, and he not having re-entered, could not maintain trespass; *Brown* v. *Notley*, 3 Exch. Rep. 219; 18 L. J., Exch. 391. As to licence implied from contract, see *Hewitt* v. *Isham*, 21 L. J., Exch. 35. As to licence involved in custom, see *Griffiths* v. *Pulesston*, 13 M. & W. 358; 14 L. J., Exch. 33.

(*a*) See *Perren* v. *The Monmouthshire Railway Company*, 22 L. J., C. P. 162; where it was held, that, though in a general count, the plea of payment into Court admits no cause of action (beyond the amount paid in), it is otherwise as to a special count. And according to the principle of other cases, *Morris* v. *Jones*, 1 Q. B. Rep. 397, it should seem that if the plea is specifically applied, it may have the same effect. It has indeed been held, that the plea of payment into Court cannot have special allegations as to matters of fact affecting the validity of the defence; *Key* v. *Thimbleby*, 6 Exch. 692; 20 L. J., Exch. 292; *Norwood* v. *Pitt*, 28 L. J., Exch. 212; but there is nothing to preclude the plea from being specifically applied to any portion of the claim, and the form given pre-supposes that it may be pleaded as to part of the causes of action. No doubt it may be pleaded generally as to part, merely stating the *amount*, but it may also be pleaded to particular *acts* or trespasses, or the trespassing at particular times or places; and, if so, admits them. See *Tuttershall* v. *Parkinson*, 16 L. J., Exch. 196.

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sold, and that he made no claim for the detention of the premises or the salvage. It was further shown that the plaintiff was on the premises continually, and never demanded possession.

It appeared, however, that, by reason of depredations, part of the salvage was lost while the Company's men were in possession.

The rent of the premises was 60*l.* a year.

COCKBURN, C. J. (to the jury).—The question is as to the amount of damage. If the plaintiff was not tenant after the 25th of March, then he is not entitled to damages after that period. But, if you think the tenancy was not put an end to, find for the plaintiff, for such damages, if any, as you think him entitled to, or for such an amount beyond the sum paid into Court as you think the plaintiff is entitled to, for the time *before* that date.

Verdict for the plaintiff, 75*l.*

CLARK AND OTHERS *v.* SMYTHIES.

Trinity Term.

In the absence of any express contract, auctioneers are entitled to reasonable remuneration for sales by private contract, effected through their instrumentality, even although by the act or default of the *vendor* the contract is rescinded; and it is for the jury whether the same commission as on sales by auction is reasonable; and, *semble*, that, apart from express contract, they would be entitled to the expenses of abortive attempts at sale; but it would not be reasonable that the auctioneer should charge not only expenses and a fixed fee, but *also* commission.

ACTION for work done and commission earned, and money paid, as auctioneers and estate agents; the particulars claiming 517*l.*

Pleas: except as to 400*l.*, never indebted; and as to that amount, payment into Court. Issue: that it was not sufficient to satisfy the claim.

Lush and *Prentice* for the plaintiffs.

Gray and *Powell* for the defendant.

In August, 1854, the defendant wrote to the plaintiffs to the effect that he had an estate, described in an advertisement he enclosed, and which he had tried to sell by private contract, and he desired to know the terms on which the plaintiffs would sell it by auction. The advertisement

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was, "To be sold, together or in lots," &c. The plaintiffs, in answer, wrote, enclosing their scale of charges by commission, and stating that they charged the commission if the estate was sold before, at, or within six months after the time of auction, and if not sold within that period, then their charges would be a fee of thirty guineas, exclusive of expenses. The scale of charges by commission was, 1,000*l.*, five per cent.; up to 2,000*l.*, five per cent. for one half and two and a half for the other; up to 5,000*l.*, two and a half per cent.; to 10,000*l.*, two per cent.; to 20,000*l.*, one and a half per cent.; above 20,000*l.*, one per cent. It was added that it made no difference whether the estate was sold in one lot or several, the charge being on the total amount realized by sale.

In October, 1854, the defendant saw the plaintiffs, and desired them to sell, either by auction or by private contract, intimating, at the same time, that he should continue his own efforts to sell.

On the 6th November, the defendant entered into a contract with one Cuddon (introduced by the plaintiffs) for the sale of two manors (part of the estate), for 3,000*l.* This sale was rescinded by the defendant, and the manors were resold by him to one Wilson.

On the 8th November, 1854, an abortive sale by auction took place at Hereford.

On the 8th May, 1855, six months after, this abortive attempt at a sale by auction expired.

During the years 1856 and 1857, the plaintiffs continued their endeavours to sell the rest of the estate, and from time to time advertised the property. So, during 1858 and up to April, 1859, there was another abortive sale by auction, in London.

In April, 1859, the defendant intimated to the plaintiffs that he had nearly concluded a contract of sale, and that further operations were to be suspended.

In August, 1859, the sale was completed, for 13,800*l.* net.

In December, 1859, the plaintiffs sent in their account of what the amount was, 517*l.*, comprising commission on the 3,000*l.* and also on the 13,800*l.*; 30 guineas and the expenses for the abortive sales by auction in Hereford and London, and the expenses of advertising, &c. The defendant objected to the claim on the ground that there had been no sale within the six months mentioned in the original contract (which, he contended, was the only one ever entered into); that, therefore, the plaintiffs could not charge the fee of thirty guineas, as well as expenses, for these two abortive sales by auction; that the sale to Cuddon proved abortive, and the sale to Wilson was without the plaintiffs' agency. The plaintiffs, on the other hand, contended that the original contract applied to the two abortive attempts at sale, and that, as to the sale by private contract, they were entitled to remuneration on a *quantum meruit*, and their expenses; that, as to both the actual sales, they were entitled to commission; that the sale to Cuddon having been once completed, but rescinded by the defendant, was not the less a sale for which they were entitled.

One of the plaintiffs was now called to prove directions, after the six months had expired, to sell by private contract, and these directions, they contended, created new contracts.

The defendant was called to show that these were only modifications of the original contract.

It appeared that there were errors in the items for advertising, reducing the claim to 533*l.*

The defence was, that there was no retainer after the original one, and that the 400*l.* paid into Court covered the first and second sales.

COCKBURN, C. J. (to the jury).—The question is, whether the plaintiffs are entitled only to recover upon the first contract or upon others. Now, if they are only entitled under the first, they are not entitled at all as to sale by

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private contract, for there was no sale within the six months. As to the sale to Cuddon, it appears to me that, as it was once a complete contract, and the defendant chose to rescind it, the plaintiffs are entitled to their commission upon it, but I will reserve that point if necessary. As to the first attempt, the defendant could have had no answer if the plaintiffs had sent in their bill immediately after the first six months had elapsed, and there does not appear to be any answer to it now. As to the other attempt at sale by auction, probably the original contract applies. As to the final sale by private contract, that is not provided for by the original contract, and therefore it appears to come to a question of reasonable remuneration. But the plaintiffs could not (in the absence of any express contract) be entitled both to their fee and expenses and *also* to commission. They may have it *either* way as you may think reasonable, but not in *both* ways.

The jury found 55*l.* beyond the amount paid into Court, excluding the amount charged for the commission upon the sale to Cuddon, as to which the point was reserved; but

Prentice, for the plaintiffs, relinquishing that part of the claim, the leave was withdrawn, and the *postea* stood.

Verdict for the plaintiffs, 55*l.*

Guildhall, coram Hill, J.

FENWICK *v.* BRINKWORTH.

Trinity Term.

Evidence to show not that an agreement in writing was a mere blind and never intended to have any operation at all, but that it was only to have a partial operation:—*Held*, inadmissible, as in effect altering by parol the terms of the written agreement.

ACTION for use and occupation of a house.

Plea: never indebted.

Manisty for the plaintiff.

C. Wood for the defendant.

One Milner had built the house and mortgaged it to the plaintiff. Designing it for a public-house, he had agreed with the defendant, in February, before it was completed, to let it to him, and the plaintiff had assented, and had entered into such an agreement in writing, under which the defendant had occupied.

C. Wood, for the defendant, cross-examined to show that this was only done as a sham in order that the defendant might produce the agreement before the magistrates to show that he was tenant, and thus to obtain a licence; and when the case for the plaintiff was closed, he proposed to prove that it was arranged with Milner that he should go into the house and obtain the licence, but that he was not to be called upon to pay rent, but be allowed 100*l.*, to hold until the house was sold; that he signed the agreement with Milner, who said it would be necessary also to sign one with the plaintiff, the mortgagee, and that the defendant did so sign it, but that it was distinctly understood between the defendant and the plaintiff that the plaintiff was not to be called upon to pay rent.

HILL, J.—That would be to alter the terms of the agreement by parol (*a*). And I rule that such evidence cannot be received.

Thereupon *C. Wood* yielded to a

Verdict for plaintiff.

(*a*) Not to show that the agreement was to have no effect or operation *at all*, and was *altogether* a *sham*; and so *no* agreement. For it *was*, according to this case, to have some operation; since, under it, the defendant was to be and did really become tenant, and was to hold until the house was sold. Evidence is always admissible to show that an alleged agreement, whether in writing or not, "never had *any* legal existence or binding force, either by reason of forgery or fraud, or for want of due execution and delivery," i.e. delivery as an agreement. Taylor on Evidence, 747; *Pym* v. *Campbell*, 25 L. J., Q. B. 277.

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An action maintained by a wife for earnings after an order of a police magistrate upon desertion by her husband, notwithstanding that *ever since* the desertion she had been living in adultery, it not appearing that she had begun the adultery *before* the time specified in the order. *Quære*, if it had so appeared? *Semble*, that the order not having been discharged, it would have made no difference.

THOMAS *v.* HEAD.

ACTION for money lent, &c.

Pleas: 1. Never indebted.

2. That the plaintiff, before and at the time of the making of the said contracts, was, and still is, the lawful wife of one H. Thomas, and that H. Thomas, after the accruing of the said debts and causes of action, dissented and thence continually hitherto hath dissented from the plaintiff's suing for the recovery thereof, or taking any interest therein.

Replication, taking issue on the pleas, and also,

2. That before the making of the said contracts the plaintiff was deserted by her husband, and after such desertion, she being then resident within the metropolitan police district, applied to D. Jardine, then being a police magistrate, for an order (*a*) to protect any property she

(*a*) Under the Divorce Act, 20 & 21 Vict. c. 85, s. 21, a wife deserted by her husband may, at any time after such desertion, if resident within the metropolitan district, apply to a police magistrate for an order to protect any money or property she may acquire by her own lawful industry, and property which she may become possessed of, after such desertion, against her husband or his creditors, &c.; and such magistrate, if satisfied of the fact of such desertion, &c., may make and give to the wife an order protecting her earnings and property acquired since the commencement of such desertion from her husband and all persons claiming under him, and such earnings and property shall belong to the wife as if she were a *feme sole*; provided that such order shall, within ten days after the making thereof, be entered with the registrar of the County Court within whose jurisdiction the wife is resident; and that it shall be lawful for the husband, and any creditor, &c., to apply to the Court by whom such order was made for the discharge thereof. Provided also, that if the husband, or any creditor of or person claiming under the husband, shall seize or continue to hold any property of the wife after notice of any such order, he shall be liable at *the suit of the wife*, which she is *hereby empowered to bring*, to restore the specific property, and also for a sum equal to double the value of the property so seized or held after such notice as aforesaid. Provided also, that if any such order of protection be made, the wife shall,

might acquire by her own lawful industry, and property which she might become possessed of after such desertion from her husband, &c.; and thereupon the magistrate, being satisfied of the fact of such desertion, and that the same was without reasonable cause, and that the plaintiff was maintaining herself by her own industry, made and gave to her an order protecting her earnings and property acquired by her since the commencement of such desertion from her said husband, and all creditors or persons claiming under him, which order was, within ten days after the making thereof, entered with the registrar of the County Court of Westminster, within the jurisdiction of which Court the plaintiff then and during all the time aforesaid was resident, and is still in force. And the plaintiff says that the monies and causes of action in the declaration mentioned were earnings and property acquired by her since such desertion, and that such desertion has from thence hitherto continued and hitherto continues. Issue.

Robinson for the plaintiff.

J. A. Russell for the defendant.

during the continuance thereof, be and be deemed to have been during such desertion of her, in the like position in all respects with regard to property and contracts, and suing and being sued, as she would be under this act if she obtained a judicial separation. As to which, sect. 25, "In every case of a judicial separation the wife shall, from the date of the sentence, and while the separation shall continue, be considered as a *feme sole* with respect to property of every description which she may acquire, or which may come to or devolve upon her," &c. And, sect. 26, "The wife shall, whilst so separated, be considered as a *feme sole* for the purposes of contract, and wrongs and injuries and suing and being sued in any civil proceeding," &c. And then, by the Divorce Amendment Act, 21 & 22 Vict. c. 108, s. 8: "In every case in which a wife shall have obtained an order to protect her earnings or property, such order shall, *until reversed or discharged, so far as is necessary for the protection of any person who shall deal with the wife, be deemed valid and effectual*," &c. As to the right of action of a married woman, at *common law*, for a *chose in action* acquired by her, see *Dalton* v. *The Midland Railway Company*, 22 L. J., C. P. 177.

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The plaintiff stated that in 1855 she had been deserted by her husband, and in July, 1855 (she was not cross-examined as to the precise date, and whether before or after the commencement of the desertion), she began depositing money with the defendant. On cross-examination she said she had lived ever since her desertion with one Edwards, who was called and stated that he had lived with her "five or six years" (*a*).

He had paid her 3*s.* a week for looking after his shop, besides certain perquisites, and she swore that the deposits she made out of her savings from this source, and also other earnings, amounted to 40*l.*

The defendant and his wife were called and denied the evidence of the plaintiff, except as to a sum of 5*l.* which she had given them to keep for her, and which they swore she had afterwards given to them for services done. There was no evidence of a demand before this alleged gift.

The order was dated 5th March, 1858 (*b*).

(*a*) He was not cross-examined (nor was she) as to the precise time when this began; nor perhaps would it be material, since the order, it would seem, would stand good *until discharged;* and the Divorce Act (*vide supra*, (*a*), p. 88) expressly gives power to the husband, or his creditors, to apply to have it discharged, as it would be if it appeared that it had been obtained on untrue statements, and if the wife had deserted her husband instead of his having deserted her.

(*b*) The order was in these terms: "Whereas J. Thomas this day appeared before me, &c., and complained that H. Thomas, her husband, *about eighteen months ago*, deserted her, &c., and the said J. Thomas, having this day applied to me for an order to protect money and property she may become possessed of after such desertion, &c., and I being satisfied of the fact of such desertion, and that the same was without reasonable cause, &c., do hereby make and give to her this my order, protecting her earnings and property acquired since the *commencement of such desertion*, &c. The Divorce Act Amendment Act, 21 & 22 Vict. c 108, s. 9, provides that every order which shall be obtained by a wife, under the said Act, *shall state the time at which the desertion, in consequence whereof the order is made, commenced;* and the order shall, *as regards all persons dealing with such wife in reliance thereon*, be conclusive as to the time when such desertion commenced. *Quære*, whether this order did state "the

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Robinson claimed the verdict, at all events for this sum, there being no set-off pleaded; but

HILL, J.—There is no evidence of any demand before the alleged gift; and having been deposited to keep for the plaintiff, there would be no right of action until demand (*a*).

Robinson submitted that the alleged gift of that sum was for the jury, and proved a demand of the *whole* sum claimed.

HILL, J. (to the jury).—The plaintiff is bound to make out her case, and if it is in doubt, you should find for the defendant. But if you believe her, find for the plaintiff.

The jury said they were satisfied as to the 5*l.*, but not as to the rest.

HILL, J.—Then find a verdict for the plaintiff for that sum.

Verdict for the plaintiff, 5*l.* (*b*).

time at which the desertion commenced?" and if it did, whether it was conclusive as against the defendant? Probably not; the intent of the proviso being clearly to *protect* the person dealing with the wife, and its *purview* being in his favour. But then it is conceived that he could not controvert it in any action, but should get the order *discharged*, if fraudulently obtained. The witness Edwards admitted that he had lived with her for five or six years; *i. e.*, since 1855; and the deposits began then, yet the desertion laid in the order was only in Sept., 1856. This was not observed at the trial.

(*a*) See *Pott* v. *Clegg*, 16 M. & W. 321. *Aliter* of a *debt*, payable on demand, 2 M. & W. 223, the distinction between a *debt* and a *bailment*.

(*b*) The first instance, it is believed, of an action being maintained by a wife under the Divorce Act for savings out of her earnings after a decree or order for judicial separation. Before the act they passed to the husband. See *Bird* v. *Pegrum*, 22 L J., C. P. 166.

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There may be a reference of a cause or of matter of account thereon by the judge at the trial, on the application of either party, under sect. 3 of the C. L. P. Act of 1854, and this, although the "matter of account" is not between the plaintiff and defendant, but between one of the parties to the cause and a third party, provided it is by plea, or otherwise mixed up with the cause of action or defence.

ADAMS AND ANOTHER (*a*) *v.* YEOMAN.

ACTION on a bill of exchange for 50*l.* (dated in 1853), drawn by the defendant on and accepted by one Ramsay, and indorsed by one Weaver to the plaintiff.

Pleas (*inter alia*): 1. That the bill, while in the hands of Weaver, was satisfied and discharged by Ramsay, the acceptor.

2. (For a defence on equitable grounds), that Weaver indorsed the bill to the plaintiffs, and they received and always held and still hold the same as the agents of Weaver, and to demand and recover the amount of the bill for his use and benefit, and not otherwise; and that there was no other consideration or value for such indorsement; and the plaintiffs sue as his agents and on his behalf; that Weaver was and is indebted to the defendant in an amount equal to the plaintiffs' claim, and that Weaver indorsed the bill to the plaintiffs for the purpose of preventing the defendant from setting off the said debt so due to him as aforesaid. Issue.

J. Brown for the plaintiffs.

Hawkins for the defendant.

There had been interrogatories administered to the plaintiffs with the view of showing that they had not given value for the bill.

Weaver was called to prove the indorsement to the plaintiffs for valuable consideration, and stated that he was indebted to them at the time of the indorsement to a considerable amount.

But it appeared from his examination that there were accounts unsettled between him and the defendant, and

(*a*) The name of one of the plaintiffs having been omitted in the writ by a mistake of plaintiffs' attorney, was added by way of amendment at chambers. See *Gibson* v. *Vorley*, 25 L. J., Q. B. 75; *Williams* v. *Groves*, Vol I., p. 341; *Robson* v. *Doyle*, 3 E. & B. 396.

also between him and the plaintiffs; and these matters of account being gone into with a view to the defences pleaded,

HILL, J., said these were matters of account which could not be conveniently tried by the jury.

J. Brown assented to this, and suggested that these matters might fitly and properly be referred by his Lordship to arbitration under the Common Law Procedure Act, 1854, s. 3 (*a*).

HILL, J., thereupon went to consult POLLOCK, C. B., and on his return, said—The course which I shall pursue is this: I shall postpone the matters of account, trying, first, the other issues of fact (*b*), and then, unless the matters of account become immaterial (as they may), I shall refer them to arbitration, by virtue of the powers vested in me by the Act of Parliament.

The cause was then tried on the other issues, but, as the essential allegations in the pleas could not be made out, the defence failed, and the jury gave a

Verdict for the plaintiff.

(*a*) If it be made appear, *at any time* after the issuing of the writ, to the satisfaction of the Court or a Judge, *upon the application of either party*, that the matter in dispute consists, wholly or in part, of matters of mere account which cannot be conveniently tried in the ordinary way, it shall be lawful for the Judge, upon such application, if he think fit, to decide such matter in a summary manner, or to order that such matter, either wholly or in part, be referred to an arbitrator appointed by the parties or to an officer of the Court, upon such terms as the Judge shall think reasonable. There is no limitation before trial; although, by mistake, those words are in the marginal note. See *Jones* v. *Beaumont*, Vol. I., p. 336; *Murray* v. *The Sunderland Dock Company*, *ibid.* 179.

(*b*) If it shall appear to the Judge that the allowance or disallowance of any items in such account depends upon a question of fact, fit to be decided by a jury, it shall be lawful for the Judge to direct a case to be stated, or an issue or issues to be tried. Sect. 4.

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Trinity Term.

In an action for wrongful dismissal of a newspaper critic engaged for a year, *Held*, that mere angry expressions which neither support a plea of justification nor of rescission by mutual assent, and that an isolated instance of neglect or insolence would be no ground of dismissal, at all events unless the insolence were such as to be incompatible with the continuance of the employment, and a plea so framed, as to import *several* if not habitual instances, allowed to be amended by restricting it to *one* instance only, on the terms of putting the plaintiff as much as possible in the same position as if the plea had been originally so framed, and the plaintiff had demurred to it.

EDWARDS *v.* LEVY.

ACTION by a musical critic against the proprietor of the "Daily Telegraph" for a wrongful dismissal. The declaration was upon a contract at three guineas a week for a twelvemonth, from the 19th March, 1860. General averments.

Breach, wrongful dismissal within the twelve months.

Pleas: 1. Denying the contract.

2. That the plaintiff was not ready and willing to continue in the service.

3. That the contract was subject to the terms that the plaintiff should from time to time attend at the office to receive instructions and directions, and should conduct himself in a proper and respectful manner; but that he wrongfully, wilfully, and without reasonable cause or excuse, neglected so to attend at the office, and neglected to discharge his duty on *divers* important occasions (*a*), whereby the defendant was forced to employ other persons to fulfil the duty; and the plaintiff also, during the said term, conducted himself towards the defendant in an insolent and unbecoming manner, and grossly and publicly insulted the defendant by making divers false and slanderous accusations against him contrary to his duty; wherefore the defendant discharged him, as he lawfully might.

4. That, before breach, the agreement was by mutual consent rescinded.

Hawkins and *Matthews* for the plaintiff.

Edwin James and *Mundell* for the defendant.

The contract was entered into on the 19th March, 1860, and was proved as laid. On the evening of the 7th April, Easter Saturday, the plaintiff went out of town, leaving a message for the defendant that he should call on Easter

(*a*) See, as to the effect of this, and that it imports more than one occasion, per WILLES, J., 26 L. J., Exch. 164.

Monday, the 9th, for the purpose of obtaining the necessary cards of admission to the theatre. Accordingly, about a quarter-past eight o'clock on the evening of the 9th, the plaintiff, having been, as he said, accidentally late, called at the office, and saw the defendant, in the presence of one or two other persons employed on the paper. The defendant appeared to have been vexed, and told him he was too late to attend the opera at that hour, for that it would be half over by the time he got there. The plaintiff answered that he knew the opera well, having heard it several times. The defendant said that he would be too late, at all events, to abuse the orchestra or overture, which happened to be new that night. The plaintiff, a little annoyed, replied that he was not in the habit of writing what was not true; and that the defendant was ready to abuse or praise for the sake of obtaining advertisements. The defendant was angry at this, and told him to "leave." The plaintiff, going away, said he was quite willing to do so, and that if the defendant desired his services he must send for him. There was no theatrical *critique* in the paper for that night. Next morning the plaintiff wrote to the defendant that he was perfectly ready to attend any of the theatres in the discharge of his duty. The defendant replied that his conduct had been so insolent, that, in the absence of all apology, he must consider himself dismissed.

HILL, J. (at the close of the case for the defendant).—The special plea is not proved. The first part of it then is not supported. Then, as to neglect, although habitual neglect would be a good ground of dismissal, there is no evidence of it, and an *occasional* neglect would be no justification. So, as to behaving in an unbecoming manner, a single instance of insolence on the part of a gentleman employed in such a capacity would hardly justify dismissal; and the plea appears by its phraseology to import that there were *several* instances of it, if not a continuous and habitual insolence. The plea, therefore, must clearly be

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amended, and I will allow any amendment necessary to try the merits of the case. To make the plea consistent with the evidence it must be confined to a single instance of unbecoming behaviour, since the rest is not proved. It cannot be permitted that the plea should stand in its present form, since, after verdict, it would be construed in a sense which would make it good in law, and would probably be taken to mean that there was an habitual course of insolence or neglect, whereas there is no evidence of such a degree of misconduct.

Mundell proposed to amend the plea in accordance with this view; but

Hawkins contended that this would make the plea bad, as a single instance of neglect or insolence would not be a good ground of dismissal, and the plea as amended might have been demurred to if originally so pleaded (*a*).

HILL, J.—That is so; and therefore if the amendment is made the plaintiff is to be put as much as possible in the same position as if the plea had been originally so framed, and the plaintiff had demurred. The plaintiff must have leave to move to enter the verdict, supposing the plea as amended is found for the defendant, and the Court think that the amendment ought not to be allowed (*b*).

(*a*) *Evans* v. *Powis*, 1 Exch. Rep. 601.

(*b*) All such amendments as may be necessary to raise the real question in controversy between the parties shall be allowed, on such terms, as to costs or otherwise, as the Judge may think fit; C. L. P. Act, 1852, s. 222. This has been construed, in a somewhat similar case, to mean the question in controversy before or at the time of suit; *Wilkins* v. *Reed*, 15 C. B. Rep. 192. Now where, as here, the plea of justification is to be altered so as to accord with the real facts, it is plain that the real matter in controversy between the parties was, whether on *those* facts there was a good ground of dismissal. And, therefore, *if those facts* were not disputed by the plaintiff at the trial, clearly he ought to have the costs of *that issue;* and if no other were found for the defendant, the *general* costs, for it is clear the real issue is an issue of *law*, and the costs of the trial were thrown away by reason of the defendant's false plea.

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Mundell submitted that there was evidence in support of the other pleas.

HILL, J. (to the jury).—There are four questions to be left you.

1. Was the plaintiff ready and willing to remain in the employment of the defendant in the capacity and on the terms mentioned in the contract? If not, you must find for the defendant.

2. Was the plaintiff guilty of such insulting and insubordinate conduct as to be incompatible with the continuance of the relationship subsisting between him and the defendant? If so, then the defendant was justified in dismissing him, and you must find for the defendant (*a*).

3. Was there any mutual consent or agreement to rescind the engagement *before* the defendant's dismissal of the plaintiff? I can see no evidence of such an agreement of rescission, and I advise you *not* to find it as a fact. For on the evidence it is clear that the parties met and were angry, and that the defendant dismissed the plaintiff, and that the plaintiff never agreed *before* the dismissal to rescind the agreement.

4. If you find for the plaintiff, what is the damage?

The two main questions, then, are, whether the plaintiff was ready and willing to remain in the performance of his duty under the contract, and whether he was guilty of *such* insolent and insubordinate conduct as precluded the defendant from retaining him in his employ.

That depends upon your view of the evidence. The parties met and were angry; some angry expressions escaped each of them. The defendant, according to the weight of evidence, first used provoking words; the plaintiff replied in the same way; the defendant desired him to go; the plaintiff said he was quite ready; and if the defendant desired him he must send for him. That last expression, coupled with the letter sent the next morning,

(*a*) See *Horton* v. *M'Murtry*, 29 L. J., Exch.

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seem to show that he was ready to continue in the employ. But next day the defendant declared that he deemed him dismissed.

As to the damages, you should consider that the year will not expire until next March, so that the plaintiff will have had almost the whole of it to himself.

Verdict for the plaintiff, 40*l.* (*a*).

(*a*) See *Goodman* v. *Pocock*, 19 L. J., Q. B. 410.

COKER *v.* YOUNG.

Trinity Term.

On a building contract whereby additions and alterations were not to avoid it, but to be allowed for at amounts to be named by the employer's surveyor, the contract being made up of a tender framed on quantities calculated by the surveyor, and specifications referred to them, and signed by the *builder* alone: —*Held*, that the builder having completed the work and claimed payment under the contract, could not claim for work as excess of the "quantities" on which it was based; nor for any additions or alterations beyond the amount allowed by the surveyor; and that the tender required a stamp, as a minute or memorandum of agreement.

ACTION for work and labour as a builder; the particulars claiming a balance as follows:—

On contract	£1,985
Additions, &c.	160
Departures from specifications . .	89
Work in excess of the quantities calculated on behalf of the defendant .	142
Separate work	81
	2,457
Credits for payments	2,173
Balance	£284

Pleas: 1. Never indebted.

2. Payment.

3. Set-off for penalties.

4. Arbitrament by the surveyor.

Hawkins and *H. James* for the plaintiff.

Macaulay and *T. Chambers* for the defendant.

The plaintiff had signed a tender or offer to do the work of building a house, according to specifications and plans, for 1,985*l.*, to be completed by the 19th June, 1859. This

tender was based on quantities calculated by defendant's surveyor. The contract provided that alterations or additions should not avoid it, but be allowed for as estimated by the surveyor. The work was not completed until October, 1859. The account was sent in as above. The last item of 81*l.* was admitted, being entirely different work, quite apart from the contract as to the house. The other items were disputed. The main items were, 89*l.* for works different from those in the specification, as a verandah, &c.; 161*l.* for additions and alterations; and 142*l.* for work and materials found to be required in excess of the quantities as calculated by the defendant's surveyor. The claim had been referred to the surveyor, who allowed a certain sum refused by the plaintiff.

On the statement of the case,

HILL, J.—As to the item of 89*l.* for work different from the specifications, it seems to be the same as the first of 161*l.* for "additions and alterations" (for a verandah is an addition); and then the contract provides that they shall be allowed for only as estimated by the surveyor. Then, as to the claim of 142*l.* for work and materials in excess of the quantities estimated by the defendant's surveyor, the plaintiff has, in his particulars, adopted the contract, claiming 1,985*l. as per contract;* and he cannot be allowed to blow hot and cold, and say at the same time that the contract is not binding upon him. If it was framed upon the basis of false calculations made by the defendant, that might be a reason for setting aside the contract altogether (*a*);

(*a*) Repudiating it when the falsity was discovered; *Selway* v. *Fogg*, 5 M. & W. 83.

Whether the question is as to the existence of an agreement in writing, so as to exclude parol evidence of its contents (*Lockett* v. *Nicklin*, 2 Exch. Rep. 93, 19 L. J. Rep., Exch. 403; *Tyrwhitt* v. *Lambert*, 10 A. & E. 470); or, as to the necessity for a stamp (*Bethell* v. *Blencoe*, 3 M. & G. 119, 10 L. J. Rep., C. P. 243; *Beeching* v. *Westbrook*, 8 M. & W. 411, 10 L. J. Rep., Exch. 464; *Vollans* v. *Fletcher*, 1 Exch. Rep. 20, 16 L. J. Rep., Exch. 173; *Clay* v. *Crofts*, 20 L. J. Rep., Exch. 361; *Hegarty*

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but the plaintiff cannot claim under it, and set it aside at the same time.

Hawkins applied to amend the particulars.

HILL, J.—I will allow any amendment to meet the justice of the case, but however the particulars are amended the case will not be altered in substance; for the contract is conclusive until got rid of, and it would still come within

v. *Milne*, 23 L. J., C. P. 151); or, as to its sufficiency under the Statute of Frauds (*Goodman* v. *Griffiths*, 26 L. J., Exch. 145; *Sarl* v. *Bourdillon*, *ibid.* C. P. 71); or, generally, as to the completion of a contract, whether in writing or not, and whether as to pleading or evidence (*Fremlin* v. *Hamilton*, 7 Exch. Rep. 398, 22 L. J., Exch. 105; *Cope* v. *Atkinson*, 8 Exch. Rep. 185, 22 L. J., Exch. 37; *Furness* v. *Meek*, 27 L. J., Exch. 84); the question did seem in this respect to be substantially the same; viz., does the document contain all the terms of the contract? and have they in *fact* been finally agreed to by both parties? whether that assent be shown by the signature of both to the document, or by its being written by one and signed by the other, or by its being sent by one side to the other, and retained and accepted absolutely and without alteration, and acted on by both parties as containing the terms of the agreement, which was the case in the above case. There is no doubt this distinction, that under the Statute of Frauds the agreement must be signed by the party *sued;* but that is by force of the particular provision; and the terms of the Stamp Act are: "minute or memorandum of agreement, whether the same shall be only *evidence* of a contract, or obligatory upon the parties by its being a written instrument," 55 Geo. 3, c. 184; and whether it is "evidence of the contract" is just a question as at common law under the rules of evidence; and the distinction drawn between what is evidence "and what is obligatory from its being a written instrument," plainly implies that the writing may be evidence of the contract, although not signed by both parties; as, where it is signed by one side and accepted by the other and acted on by both, provided it is accepted without any variation or alteration as in the above case. If, indeed, the terms are varied from, all the cases show that for no purpose is it an agreement; or if *neither* party is bound by the document, then it neither excludes parol evidence nor requires a stamp; *Ramsbottom* v. *Tunbridge*, 2 M. & S. 434; *Stone* v. *Dowla*, 29 L. J., Exch. 122. Whether the document does contain the terms, or has been finally assented to, is necessarily a matter of parol proof, being just as if, though signed by both parties, the question is raised, whether it was intended to take effect at once, or at all? *Pym* v. *Campbell*, 25 L. J., Q. B. 277.

the general proviso, that no departures from the contract shall avoid it, but be allowed for according to the estimate of the surveyor. The case is thus brought within the principle of *Scott* v. *Avery* (*a*), and the plaintiff must prove, as part of his ground of action, the surveyor's estimate of the additional claim.

Hawkins thereupon offered to prove the surveyor's allowance of a certain sum; no *certificate* or *written* allowance being expressly required, an oral allowance will suffice.

HILL, J.—Clearly so.

Hawkins then called the brother of the plaintiff (who had looked after the business), and produced the tender, as follows:—

"I will undertake to complete the new buildings, &c., in accordance with plans and specifications prepared by Mr. Morgan (the surveyor), for 1,985*l*."

This was signed by the *plaintiff* alone.

HILL, J.—You must put in the specifications, or you cannot go into any question of extras.

The specifications were then produced, also signed by the *plaintiff*.

HILL, J.—They must be stamped.

Mathew urged that they did not form a contract, being signed by only one of the parties, and that *not* the party to *be charged* in this action (*b*).

HILL, J.—They do not the less form a minute or memorandum of a contract within the Stamp Act.

The documents not being stamped, the plaintiff yielded to a

Nonsuit.

(*a*) 8 Exch. 497.

(*b*) See *Johnson* v. *Weston*, Vol. I. p. 693.

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Coram Blackburn, J.

EDWARDS *v* PHILIPS.

Trinity Term.

The question, on a plea of insolvency, being, whether the debt was contracted before the final order, a deed given at the time by way of security being dated before the order, parol evidence on part of the plaintiff to explain this, and to show that the real date of the transaction was later, was admitted, he not being a party to the deed, although drawn and attested by his agent in the business.

ACTION for money lent, and goods sold; the particular claiming a balance of 40*l.*

Plea: that after the accruing of the causes of action, the plaintiff, being a prisoner in actual custody, the Court for Relief of Insolvent Debtors (1 & 2 Vict. c. 110) duly made an order, that all his real and personal estate should be vested in the provisional assignee, whereby the causes of action became so vested. Issue.

Keane for the plaintiff.

T. Atkinson for the defendant.

The defendant began and proved that the plaintiff, in July, 1858, being a prisoner for debt in Maidstone Gaol, petitioned the Court, during which time his business was carried on by his son. And a deed was put in, dated *August*, 1858, executed by the defendant, and drawn out and *attested* by the plaintiff's *son:* whereby in consideration of the debt in question, the defendant assigned certain prize money to the plaintiff.

The vesting order was in September, the discharge in October.

The consideration was the sale of two watches and some cash lent.

The defendant being abroad, the only witness on his side was his wife; on the other hand, the plaintiff and his son, and another witness—the other of the attesting witnesses—proved that the debt accrued in December, and that the deed was not really executed until then, though it had been originally drawn and dated in August (*a*).

(*a*) The plaintiff not having executed the deed was of course not estopped, even if the action had been on the deed; and his son, and the other attesting witnesses, were at liberty to explain the matter. See *Morgan* v. *Couchman*, 23 L. J., C. P. 36.

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BLACKBURN, J. (to the jury).—The sole question is, whether the debt was contracted, i. e. a debt for goods sold and money lent, before the making of the final order in October. The preponderance of parol evidence is great; but the date of the deed is entitled to very great weight, although the explanation offered is for your consideration (*a*).

Verdict for the defendant.

(*a*) See *Davis* v. *Jones*, 25 L. J., C. P. 91, 17 C. B. 634; *Holding* v. *Elliott*, 29 L. J., Exch. 134.

FOSTER *v.* EADES.

Trinity Term.

Credit unexpired is no defence to a count for not accepting goods, if they have not been accepted according to the contract.

ACTION for not accepting goods agreed to be purchased. Count for the price of goods sold [no count for not accepting a bill of exchange].

Pleas: denying the contract in the first count, and the debt in the second.

T. Atkinson for the plaintiff.

Powell and *T. Chitty* for the defendant.

On the 3rd December, 1859, the defendant agreed to buy of the plaintiff a lot of timber, to be sent by rail; on its arrival at the station he removed and re-sold the greater part, but complained that the rest was not according to the contract, and ultimately refused to accept it. The payment for the whole was to be by bill of exchange at six months, and the action had been brought before the six months had expired.

A bill of exchange had been sent to the defendant for the entire amount of the price, but had not been accepted.

Powell, for the defence, relied on that, citing *Paul* v. *Dod* (*a*), but

BLACKBURN, J.—That is no answer to account for not accepting the goods, where the defendant has not ac-

(*a*) 2 C. B. 800.

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cepted them (provided they were according to contract), for the very breach relied on is, that he has not accepted them; and that where the payment was to be by bill, that implies that he has not so paid for them, that is, has not accepted a bill for the entire price. It was for him to tender such a bill, and he not only does not do so, but refuses to do so when requested, because he refused to accept the whole of the goods, that is, he did not accept and pay for the goods according to the contract, supposing they were according to the contract. The question to be tried is, therefore, whether the timber was according to contract (*a*).

Verdict for the plaintiff.

(*a*) This was by consent referred.

Coram Erle, C. J.

POLE AND ANOTHER *v.* CETOVICH.

Trinity Term.

If the performance of a contract becomes, from unforeseen circumstances, perilous to the party entitled to demand performance, the party upon whom lies the burden of performance may be justified in pausing for a reasonable time, in order to consider the danger, and, if possible, communicate with the other party; and *quære* whether, supposing the parties could not communicate, the danger might not excuse an absolute breach of contract?

ACTION by charterer against shipowner for not sailing according to charter. The contract laid was, that the defendant's ship, then at the port of Gloucester, should, after discharging her outward cargo, proceed to Havanna, and there load, and being so loaded, proceed to Cowes or Falmouth for orders, unless ordered from the port of loading to her port of discharge direct or to Gibraltar, for orders to discharge at a safe port in the Mediterranean, and thence as ordered to a safe port within certain limits in the charter mentioned, or as near thereto as she might safely get, and deliver the cargo—excepting restraints of princes and rulers, &c., and all *other dangers of the seas* of whatever kind. That the ship proceeded to Havanna, and that then it was agreed between the plaintiffs and defendant, that the ship should, if so ordered, proceed with the cargo to certain ports not within the limits mentioned in the charter, to wit, Copenhagen, in consideration of an advanced rate of freight.

Averment: that the ship afterwards was at Falmouth, duly ordered by the plaintiffs to proceed to Copenhagen, General averment.

Breach: that the ship did not, although not prevented by any of the excepted perils, proceed to Copenhagen.

Pleas; 2. That the ship was not duly ordered by the plaintiffs to proceed to Copenhagen as alleged.

4. That after the ordering to proceed to Copenhagen, and before any default, the plaintiffs revoked that order, and ordered the ship to proceed to *Plymouth*.

5. That after the breach the plaintiffs and defendant agreed that the ship should sail to Plymouth, and that she did so, and that this was accepted in satisfaction of the breach.

Bovill and *Honyman* for the plaintiffs.

M. Smith and *Watkin Williams* for defendant.

The charter was in November, 1858. The ship was Austrian.

In April, 1859, the defendant agreed to go to Copenhagen.

On June 18th, 1859, the ship was at Falmouth, and war then existed between France and Austria, and French ships were searching for Austrian, so that it was dangerous to leave a neutral port for any port on the continent.

On the 28th June, the plaintiffs, from London, desired the defendant to proceed to Copenhagen. He communicated with them through the broker in London, and explained the danger.

On the 2nd July, the plaintiffs then sent down an agent to see the defendant, who again explained the peril. The agent told him to go to Plymouth, under protest. He said he would not go under protest, but that if the plaintiffs gave him a clear order he would go.

The plaintiffs' agent then, on the same day, gave this order in writing.

"I have now to request that you so proceed, without

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delay, to Plymouth, and there deliver your cargo to the holder of your bill of lading."

There was no evidence of any accord.

ERLE, C. J. (to the jury).—If you think that before the defendant was guilty of any breach he got a clear order to go to Plymouth, you should find for the defendant. The first question is, whether there was a refusal to sail according to the contract; upon that the question is, whether the captain was justified in pausing under the circumstances?

(The jury answered in the affirmative.)

Then, did the plaintiffs give a "clear order" to sail to Plymouth, or was it merely under protest, in consequence of a refusal to sail to Copenhagen?

The jury found that the delay was reasonable; and that the order was a clear order, and not under protest; whereupon

Verdict for the defendant.

ST. LOSKY *v.* GREEN AND OTHERS.

Trinity Term.

In an action on a contract for the delivery of coal, differently described in several counts, but in all described as "hand-picked," and it appearing that the parties well understood before trial that the real controversy between them was, whether the coal was to be hand-picked, the Judge amended, to avoid a variance, by striking out all the words of description except the word "hand-picked," and this without the imposition of any terms.

ACTION on a contract to ship 1,000 tons of coal for the plaintiffs.

The first count laid the contract thus:—That the defendants agreed to sell 1,000 tons of Thomas's Merthyr coal, of the description called "through and through," to be *hand-picked*, at 8*s.* 9*d.*

Breach, non-delivery of coal of that character, quality and description.

The second count laid the contract as being for 1,000 tons of Carr's Merthyr steam coal, of the description called "through and through," to be *hand-picked*, at 8*s.* 9*d.* per ton.

Breach, non-delivery of coal of that character and description.

Pleas: denying the agreements laid.

2. (To the *first* count), that after the making of the agreement, and before breach, the plaintiffs and defendants agreed that coal of a different description, Carr's Merthyr steam coal (not saying hand-picked), should be substituted, and that it was accordingly substituted and accepted by the plaintiffs.

3. (To the *second* count), delivery of coals according to the contract.

Lush and *J. A. Russell* for the plaintiffs.

M. Chambers and *Joyce* for the defendants.

On the 8th September, 1858, the plaintiffs and defendants made a contract for steam coal, of which there was a note in writing—" 1,000 tons of Thomas's Merthyr coal, called ' through and through,' at 8*s.* 6*d.* per ton."

The plaintiffs' evidence was, that on a subsequent day they met the defendants, and the contract was altered thus: that there was to be the same quantity of coal (not saying what description by name), to be *hand-picked*, at 8*s.* 9*d.* per ton.

The bill of lading, dated 27th September, 1858, was indorsed " Carr's Merthyr Tydvil," and on the next day, so soon as it was seen, it was rejected by the plaintiffs as not being according to contract.

The evidence for the plaintiffs was strong that the coal was not hand-picked (i.e. large lumps of coal picked out by the hand), but that it was small coal of the kind called " through and through" (i.e. screened), and that at least a fourth part of it was small and almost entirely dust.

Lush examined as to whether " through and through" was steam coal or fit for steam-engine purposes at all.

M. Chambers objected, because the first count laid the contract to be for " through and through" coal, so that the evidence would be irrelevant to the issue.

Lush urged that the real issue between the parties was,

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whether the coal was to be hand-picked, and any circumstances tending—coupled with the fact that the plaintiffs told the defendants the coal was required for steam purposes, that "through and through" coal would not be the proper coal—would be admissible.

ERLE, C. J.—The question to be tried, it is quite clear, is, whether the coal was to be hand-picked. Any circumstances tending to show that it was to be so are admissible.

The coal was to be shipped to San Francisco, and examinations taken there were read to show that it was none of it "hand-picked." Some of the coal had been re-sold however.

At the close of the plaintiffs' case,

M. Chambers submitted that they could not sustain either count. Not the first, for the original contract had not the word "hand-picked;" nor the second, because the altered contract was not for "*through and through*" coal.

Lush stated that those latter words were erroneously inserted, and applied to amend.

ERLE, C. J.—Upon the evidence, especially the examinations taken at San Francisco, it is plain that the real matter in controversy between the parties always was (*a*), whether the coal was to be hand-picked; therefore the words "through and through" are obviously immaterial, and may be struck out.

M. Chambers then contended that there was no note in writing of the altered contract for "hand-picked."

ERLE, C. J.—There was a payment, or acceptance.

M. Chambers.—The plaintiffs never accepted the coal called "Thomas's Merthyr coal," as laid in the first count.

ERLE, C. J.—That only drives the plaintiffs to the *second* count, for Carr's Merthyr coal.

(*a*) See *Wilkin* v. *Reed*, 15 C. B. 192; S. C., 23 L. J., C. P. 193.

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M. Chambers.—But, as Carr's coal, it was not accepted.

ERLE, C. J.—The matter really in controversy between the parties is, whether the coal, whatever might be its other description, should be hand-picked. The words "through and through" are to be struck out as immaterial, and for the same reason any other words of description, except the word "hand-picked." Whether the coal was Carr's or Thomas's, it should seem, did not matter, so that it was hand-picked. It is compulsory on the Judge to make all amendments necessary to raise the real question between the parties (*a*).

Lush thereupon applied to strike out all the words in either count except the word "hand-picked," and as that would make the counts identical, he proposed to strike out the first count altogether.

M. Chambers objected that there were pleas to both counts, especially the plea to the first count as to a substitution of contract.

ERLE, C. J.—That plea alleges an acceptance of coal not hand-picked, and therefore, according to the evidence yet given, is disproved; and if it should be proved, the defendants will have the costs of that issue.

M. Chambers pressed for terms as to the amendment. There had been the expense of a commission to take evidence abroad.

ERLE, C. J.—Upon the substantial question, whether the coal was hand-picked.

M. Chambers pressed for costs of the amendment; but

ERLE, C. J.—I allow the amendment asked, without costs.

The declaration was amended accordingly.

Verdict for the plaintiffs.

(*a*) *Vide ante*, p. 96, n. (*b*).

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Coram Byles, J.

GOLDEN *v.* TAYLOR.

Trinity Term.

Where a document, void as a lease, is tendered in evidence to show the terms of a collateral agreement it requires a stamp as an agreement.

THE declaration alleged that the defendant had let the premises to one A. B. as his tenant, and, at the time of the demise contracted that he, the defendant, would keep the railings, in repair; whereas he had left a railing in a dangerous state, for want of proper repairs, whereby the plaintiff had sustained an injury.

Pleas: not guilty, and denying the alleged agreement.

Merewether, for the plaintiff, proposed to prove by parol, that after A. B. became the defendant's tenant, the defendant agreed to the terms stated; but it appearing that this was by an agreement in writing (the tenant being already in occupation),

BYLES, J., ruled that it must be produced, as it was material to the issue; and might be material as to the cause of action; for apart from the stipulations of landlord and tenant, *inter se*, the tenant was liable to the public, or to strangers; and the agreement could not be varied by parol.

Merewether then produced a document, and tendered it in evidence (*a*).

It was an agreement, not under seal, amounting to a demise for five years, and it was unstamped. Being objected to on that ground,

Merewether urged that, being void as a lease, it did not require a stamp, and he cited *Mott* v. *Turnage* (*b*), but did not produce the report; and

BYLES, J., doubted if it applied (*c*); and deemed the document now tendered an agreement requiring a stamp.

(*a*) That is, as evidence of the contract, stated in the count itself (and so understood by the Judge) as collateral to the *lease* itself.

(*b*) Vol. I. p. 6.

(*c*) *There* the document was the *lease itself;* which would, if it required a stamp at all, require a

Thereupon the plaintiff consented to withdraw a juror.

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lease stamp; and, being void as a *lease*, would only become evidence of the terms of tenancy, by virtue of subsequent occupation. The document, indeed, was not put in *as an agreement;* but, the action being trespass for a distress *damage feasant*, the sole question was as to the *extent* of the *locus in quo;* and the document was put in, in order, by its description of the premises, or as an *admission*, to show what, as a matter of fact, had been let: a purpose for which it was equally effective although void as a lease, and so that it was put in, not as an operative agreement; but rather as an admission (see *Walker* v. *Atkinson*, Vol. I. p. 465); because it was *not* an agreement. It is conceived, however, that in that case the decision was correct, for the reason above pointed out, and because it has been always held that an agreement, to require a stamp, must have operated as such when executed (*Clay* v. *Croft*, 20 L. J, Exch. 361), whereas here it would only be so by subsequent occupation. (See *Stratton* v. *Pettit*, 24 L. J., C. P. 182, and *Tress* v. *Savage*, 4 E. & B. 36.) Perhaps the case above reported is distinguishable.

BORGNIS *v.* EDWARDS AND OTHERS.

Trinity Term.

On a covenant by lessee that there shall be no communication or way across the demised land to a certain other place; *quære*, whether the mere opening of doors in a wall is a breach, without any user of the communication; but a user across the demised land may be a breach, even although the doors have been opened by a third party. *Quære*, whether the opening of the doors would be a breach of a covenant to uphold and maintain all buildings and erections on the demised premises, but the covenant would not apply to a wall not on the demised premised, nor to any fence not permanent.

EJECTMENT for houses, Nos. 7, 8, 9, 10 and 11, in St. Peter's Place, Hackney, and the buildings and ground thereunto belonging.

The defendant Edwards defended as landlord (the other defendants being his tenants), and held under a lease from the plaintiff, dated 20th January, 1855, being a lease of a parcel of land at the corner of St. Peter's Place, on which the houses were then in course of erection thereupon, and another piece of land (a long narrow slip) on the eastern side of the first-mentioned parcel, with all ways, easements, &c.

A plan annexed to the lease showed that the gardens belonging to and behind the houses in Elizabeth Street ran down to the end of the said second or long narrow slip of land, and which ran across the top of St. Peter's Place.

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Covenant to complete the houses: covenants, "that there shall not be any right of back entrance or way through or across the said pieces of land, except that the lessee shall be at liberty, during the continuance of the demise, to make an entrance on the east side of the *second* parcel, to communicate with the house, No. 56, Elizabeth Street (in his occupation), but there shall be no communication or way across the eastern side of the same piece of ground, to or from any house in Elizabeth Street, without the consent of the lessor in writing."

Covenant to repair, uphold and maintain the said houses and the buildings or erections to be erected or being on the land demised, &c.

Proviso, that if there should be any *default* in the *observance or performance* of all or any of the covenants the lessor might re-enter.

Particulars of breaches: 1. For making and maintaining a back entrance or way, through and across the piece of land demised by the lease, otherwise than as in the lease excepted, and without the lessor's consent; such entrance or way communicating with the houses, Nos. 57 and 58, Elizabeth Street.

2. For not repairing, upholding and maintaining the walls, palisades and fences at the east and west sides of the piece of ground secondly described and demised.

3. For waste, in pulling down and demolishing the wall and palisades at the east side of the said piece of land (*a*).

M. Chambers and *V. Harcourt* for the plaintiff.

Knowles and *Lloyd* for the defendant.

It appeared that in 1855 the houses were completed, and that since then a dwarf wall, with palisades, running along the bottom of the garden of the houses in Elizabeth Street (belonging to the defendant's father), and deviating

(*a*) See *Gange* v. *Lockwood*, *post*, p. 115.

therefrom the long narrow slip of ground *secondly* described and demised, had been pulled down and replaced with a new wall, in which three doors had been made, opening, as the plaintiff suggested, into that piece of ground so demised by him, and thus making a "back entrance" or way into the houses in Elizabeth Street. He chiefly relied on the breach first laid in his particulars, using the second and third rather in aid of it; contending that the defendant was liable either for pulling down the old wall *without* doors, or for opening doors in the new one. He also applied the first and second breaches to the alleged removal of a fence or palisade across the top of St. Peter's Place, and separating it from the end of the piece of land in question; contending that the pulling it down opened up a way from St. Peter's Place, across the demised land, to the houses in Elizabeth Street, or was a breach of the covenant to "uphold and maintain" all "erections" in and upon the demised premises.

For the defendant, his father was called, who proved that he, and not his son, had made the alterations in question; but

BYLES, J.—That is immaterial; I should amend the particulars, and hold that the covenant is broken by permitting the acts of a third party in contravention of it. It is not necessary to show any acts of commission on the part of the *defendant*; if there was a breach of the covenant he is responsible. I am so clear as to this, that I will not reserve the point.

The defendant's father, however, further proved, that he had removed the garden wall back several feet, so as to allow of a passage for workmen, ladders and materials used in repairing the houses in Elizabeth Street; that he had opened the doors in the wall only to allow of their admission; and that he kept the doors always locked and the key in his own possession, not allowing even his tenants

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the use of them, and only using them for his own workmen and materials on the occasion of repairs. Cross-examined, he admitted that he used a long ladder, which, when carried down the narrow passage, had to be turned round to get in at the garden doors, and being carried by two men, the one at the tail might possibly go a few feet on the soil of the land demised to his son.

With regard to the palisade, said to have been standing across the end of St. Peter's Place, and to have been pulled down by the defendant, both he and his father swore that it was only a hoarding put up during the completion of the houses, and removed when they were finished. Moreover, they said that the end of St. Peter's Place always opened on to the demised land, and it was paved by the parish.

BYLES, J.—It was contended on the part of the plaintiff that there was a breach as regards certain houses on the opposite side of St. Peter's Place, and thrown open to the street, but I am not sure that it would be a breach of this covenant, which seems confined to communication with the backs of houses in Elizabeth Street; but, at all events, no such breach is mentioned in the particulars, and it cannot be relied upon.

The breach relied upon appears to be the first, as to opening the back entrance; for as to the second, for not repairing the fences, the covenant does not mention fences, *eo nomine*, and the word "erections," coming after houses, must, I think, be construed *ejusdem generis*; at all events as meaning only *permanent* fences.

At the close of the case,

BYLES, J. (to the jury).—There is *some* evidence that the piece of land in question had become dedicated to the parish as a public way long before the demise, for the defendant's father spoke to a user of it as such for more than forty years; but that is immaterial, for though there is a right of way the soil remains in the owner, who may deal with it in

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any way not inconsistent with the right of way acquired; and the very object of the covenant chiefly relied on, was to *prevent* a right of way being acquired over the demised land to the back gardens of the houses in Elizabeth Street. Now whether the mere opening of the doors in the wall, without user, would be a breach of the covenant, is a question I will not finally determine, but will reserve. There is on the part of the plaintiff no evidence of *user*, and on the part of the defendant the only admission of user was the very slight admission of the probability of the man carrying the ladder coming for a few moments on the demised land. The covenant, you will observe, is not merely not to open a way or entrance into any house in Elizabeth Street, but not to open it *across the demised land.* Has there been such a way or entrance? Then, as to pulling down or not maintaining the fences, I doubt if the covenant applies to fences; but if it does, as to the long wall, it was not *on the demised land;* and as to the palisade or hoarding, it does not appear to have been permanent, and, if not, clearly was not within the covenant.

Verdict for the defendants.

Coram Willes, J.

GANGE *v.* LOCKWOOD AND ANOTHER.

Sittings after Trinity Term.

On a covenant to keep premises in repair, it is a breach to pull them down, either wholly or partially, even so far as to open doors in a wall; and it is a breach for which lessor may sue and recover substantial damages during the term. Nor is it any equitable defence that it was done with the "consent and acquiescence" of the lessor, unless it appears that it was with his *previous* consent.

DECLARATION, that the plaintiff, by indenture, demised to the defendants certain rooms in a house, and the defendants covenanted with the plaintiff that they would, during the term, keep the rooms in good and tenantable repair, and so surrender them, free from all dilapidations, at the expiration of the term, and would not affix any writing to the outside, except a brass plate, indicating the name and profession of surveyors and estate and house agents.

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Breach: that the defendants destroyed portions of the walls and opened two doorways, and affixed to the outside of the house plates announcing that they were chemical and medical agents, and agents to an insurance company.

Pleas: 1. That they kept the rooms in repair.

2. (For a defence on equitable grounds.) To the first breach, that the alteration was made with the consent and acquiescence of the plaintiff, and at great expense, which but for such consent, they would not have incurred, &c., and that the plaintiff's said consent and acquiescence, *before and at the time of making the alteration*, led the defendants to believe that he would not object thereto, and that the plaintiff has waived any breach of covenant in respect thereto.

3. As to the second breach, that the plates only indicated the profession of estate and house agents within the meaning of the covenant.

4. To the same (for a defence on equitable grounds), similar to the second plea.

T. Chitty for the plaintiff.

Garth for the defendants.

It appeared that the demise was in 1852, and that the defendants had taken the house next to the one demised, and had opened two doors in the walls between the houses, one soon after the demise and the other more lately: as to the first, there was some evidence that the plaintiff had seen it, or known of it, and had not objected: as to the second, there was no evidence of any such knowledge of it without complaint, and

WILLES, J., held that the equitable pleas failed, the defendants not proving as to *either* of the breaches any *previous* knowledge and assent on the part of the plaintiff.

As to the plates, it was contended that there was no real difference between "house agents" and "chemical and medical agents;" the latter term meaning that the defend-

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ants disposed of the good-will of chemical and medical houses. It was also contended, that, as the term was still running, the damages should be nominal, and only for the expense of replacing the walls; which, it appeared, would not be more than a few pounds.

Garth likewise contended, for the defendants, that opening the doors in the wall was not a breach of covenant to repair, &c., but

WILLES, J.—Pulling down the building to be kept in repair is a breach of the covenant to repair, uphold and maintain (*a*).

At the close of the case,

WILLES, J. (to the jury).—As to the first breach, I have already said that a covenant to repair, uphold and maintain, or keep in good repair, raises a duty not to destroy the demised premises; and the pulling them down, wholly or partly, is a breach of such covenant. There is no evidence of any assent on the part of the plaintiff.

As to the plates, the question is whether the business of a "chemical and medical agent" is different from that of a "house agent." But as to this breach the damages must be minute. It would be well to assess the damages separately (*b*).

The jury found for the plaintiff; assessing the damages at 25*l.* on the first breach, 10*l.* on the second.

Verdict for the plaintiff, 35*l.*

(*a*) See a similar ruling *per* BYLES, J., *Borgnis* v. *Edwards*, p. 112.

(*b*) See *Yates* v. *Dunster*, 11 Exch. Rep. 15; *S. C.*, 24 L. J., Exch. 226.

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Coram Erle, C. J.

Sittings after Trinity Term.

RUSSELL *v.* GRIFFITH AND OTHERS.

An action maintained by shipowner against charterers, who had agreed that the ship shall be consigned to their agents free of commission, and the cargo cleared free of expense to the shipowner;—the ship having been addressed to the consignee, who was not in a position to clear the ship, and the captain having been led by the charterers to have recourse to brokers, who cleared the ship, and charged commission for so doing, which the captain, on behalf of the plaintiff, had paid.

ACTION by shipowner against charterers. The declaration stated that the charter was to Genoa, and that the defendants agreed that the vessel should be consigned by them to their agent at Genoa, *free of commission*, and the cargo to be taken from the vessel free of any expense to the ship. General averment.

Breach: that the defendants did not appoint an agent at Genoa to whom the vessel should be consigned, nor did they consign the same to any agent of theirs at Genoa to whom the captain could report her arrival, or by whom the ship should be certified as discharged free of commission, or who would take the cargo free of expense to the ship, whereby the plaintiff was forced to and did incur expenses in reporting and discharging the ship at Genoa, &c.

Second count for money paid.

Pleas: 1. Denying the agreement.

2. That they did, according to their charter, appoint an agent at Genoa to whom the vessel should be consigned, and that she was duly consigned to such agent.

3. That the contract was rescinded.

4. That the plaintiff hindered and prevented them from appointing the said agent.

5. Never indebted.

The particulars claimed 35*l.*, paid to Messrs. Santa Maria & Co., at Genoa.

Parry, Serjt., and *T. Chitty*, for the plaintiff.

Lush and *Cleasby* for the defendants.

By the charter-party, the captain, on arriving at Genoa, was to report his arrival immediately to the charterers' agents.

The cargo was of military stores, and the captain carried

a letter of instructions to the military intendant at Genoa. The captain was now called, and said that he also carried a letter to Messrs. Santa Maria & Co.; but this was denied on the other side. It was admitted, however, that he carried a "card" of their address.

The defendants and Messrs. Santa Maria & Co. corresponded about the ship, and the plaintiff had obtained an order to inspect and take copies of these letters; which were given in evidence on the trial.

The captain, in point of fact, after reporting himself to the military intendant, had recourse to Santa Maria & Co., and they cleared the ship and charged, for commission on the freight, 35*l.*; the sum now in question; and which, as they refused to deliver up the certificate of delivery of cargo, the plaintiff's captain had to pay, and paid under protest.

The defendants had paid the plaintiff the freight less that sum, which the plaintiff received under protest, and on applying to the defendants for repayment of the 35*l.*, they refused, alleging that the captain had engaged Santa Maria & Co. on his own account; the defendants referring at the same time to, and adopting, the statement of Santa Maria & Co., which was to the effect that the ship was *not* addressed to them, and that, therefore, their arrangement had been with the captain, and that they had acted as consignees.

The charges consisted of various items, such as pilotage, &c., which it was admitted the military intendant could not have done. But, on the part of the defendants, it was contended that he would have got the business discharged free of commission.

Parry, Serjt., proposed to ask one of his witnesses, a ship broker, as to the effect or import of those words, as usually understood, but

Lush objected, and

ERLE, C. J., suggested that the question should be, sup-

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posing those words are *not* in the charter, does the ship pay commission? which was answered in the affirmative.

It was admitted by the defendants that the captain was to be at liberty to employ *any* agent he pleased, to render any assistance he might require. And that they wrote to Santa Maria & Co. to do their best for the ship's captain, and make their own bargain with him as to remuneration.

Upon the part of the plaintiff, it was contended that either Santa Maria & Co. were the defendants' agents—in that case they were responsible for their act; or they had not addressed the ship to an agent who would discharge the ship "free of commission."

Upon the part of the defendants it was contended, that they had consigned the ship to one who would have done the business free of commission.

ERLE, C. J. (to the jury).—Were Santa Maria & Co. the agents of the defendants? If the defendants did not appoint as their agents persons who should clear the ship free of expense to the shipowner, then they are liable on the charter-party. If they appointed Santa Maria & Co. their agents, then they are liable on the count for money paid. If they appointed Santa Maria & Co., then find for the plaintiff. If they appointed the military intendant as their agent *to clear the ship*, then find for the defendants.

Verdict for the plaintiff, 35*l*.

Coram Willes, J.

Sittings after Trinity Term.

WEBB AND ANOTHER *v.* CHALLONER.

Defendant held liable to share-brokers for losses on share transactions entered into with them in his name by his clerk; it appearing that he was aware of the clerk's dealings, and did not make any communication to the plaintiffs.

ACTION for work done and money paid, as stock and share brokers.

Plea: never indebted.

The particulars claimed a balance of account.

M. Smith and *Karslake* for the plaintiffs.

Edward James, Rew and *Laycock* for the defendant.

The plaintiffs were brokers in London. The defendant carried on business at Newcastle, and had a clerk named Burness.

In January, 1858, the defendant became acquainted with one of the plaintiffs, and in March, 1859, the plaintiffs sent their circular to the defendant, addressed to him personally, and from that time until September sent him daily their share list, which they sent to customers.

In March, 1859, Burness wrote them letters, signed by him in the defendant's name, "*per proc.* R. Burness," for purchases and sales of shares, &c. From that time until September nearly 100 letters passed between the plaintiffs and Burness, these being always addressed to the defendant; his being signed in the defendant's name, "*per proc.* R. Burgess." Several telegraphs were sent by the plaintiffs, addressed to the defendant, on the subject of such transactions, and answered in the same way. And several sums remitted by the plaintiffs to defendant were credited to him in his pass book. These remittances were by the plaintiffs' cheques on their own bankers.

A member of the Stock Exchange, at Newcastle, was called, and said he had had transactions with the defendant, and that in the course of executing orders for him he received and acted on instructions from Burness, but he doubted whether he ever concluded transactions without seeing the defendant. That he had, however, frequent communications with Burness on behalf of the defendant, and was in the habit of seeing Burness in the defendant's office, and had paid money to him for the defendant, but that he had never had transactions with *Burness* himself on his *own* account. (And this it will be observed was the evidence of a witness residing at *Newcastle,* who had

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means of knowledge not possessed by the plaintiffs in London.)

Accounts were sent every fortnight, addressed to the defendant.

The transactions continued till September, when there was a balance due to the plaintiffs; but, on their applying to the defendant, he disavowed the transactions, and declared his ignorance of them; and he was now called, and gave evidence to the same effect, stating that Burness had tampered with his pass book and cash book, and that he had never, in fact, received the sums alluded to as credited to him in his pass book. He admitted, however, *that he was aware of one of the telegrams*, and that he made no communication to the plaintiffs about it.

WILLES, J. (to the jury).—Are you of opinion that the defendant did authorize Burness to enter into these transactions with the plaintiffs? if so, find for the plaintiffs; if not, for the defendant.

If a man sanctions another in acting in his name, then he must bear the loss of the transactions entered into by the other, even although he derives no benefit from them.

And if the defendant was aware that Burness was dealing with plaintiffs, either on his own account or defendant's, then the defendant is liable.

It is admitted by the defendant that he knew of one of the telegrams.

And cheques, drawn and remitted by the plaintiffs, are traced through his pass book to his bankers.

When the defendant received the telegram he did nothing; at all events made no inquiries of the *plaintiffs*. Are you satisfied with defendant's explanations of these circumstances; or are you satisfied that he was cognizant of these transactions? If so, find for the plaintiffs (*a*).

Verdict for the plaintiffs.

(*a*) See *Aste* v. *Montague*, Vol. I., p. 264; and *Faldo* v. *Griffin*, *ibid.*, p. 147, and *Staveley* v. *Uzzielli*, *ante*, p. 30.

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Coram Erle, C. J.

FRESCOE *v.* MAY.

Sittings after Trinity Term.

ACTION against the defendant as the writer of a libel published in the "Medical Circular."

The libel imputed that the plaintiff, a dentist, was a quack. It was a paragraph headed "Quack Dentists," and stated that the now defendant May, an attorney, had, on the part of a medical society, obtained a summons against the now plaintiff, "calling himself surgeon-dentist, for obtaining money under false pretences; the false pretence being that he had a diploma from Dr. Cobb, whereas Mr. May (the now defendant) produced a letter from Dr. Cobb, stating that he knew nothing of the man, except his impudent and false statement in his advertisement. The society is still following up the quacks."

The *author* of a libel not excused nor justified, but for which the *publisher* had previously been sued and a verdict given against him for nominal damages:—*Held*, liable in substantial damages for the injury proved to have been sustained by the plaintiff in consequence of and since the publication.

There had been a former action for the same libel against one Yearsley, as the proprietor and *publisher;* in which action the defence was that the paragraph complained of was supplied to the then defendant as a report, and the jury gave a verdict for the plaintiff, but only for 40*s.* damages.

The present defendant pleaded not guilty.

2. That the plaintiff was not a surgeon-dentist.

3. That the libel was true.

Huddleston and *Barnard* for the plaintiff.

Macaulay and *Prentice* for the defendant.

For the plaintiff it was proved that the now defendant had written the paragraph (as *he* said, at the request of the former defendant Yearsley), and that he had furnished a report of the application to the magistrate for the summons on the charge of false pretences; which report, upon the plaintiff's evidence, was not true. And the defendant had not furnished a report of the case when it came on for hearing, and no one appeared to support it. It appeared

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that the plaintiff was a surgeon-dentist, had a diploma, and was not a quack,

The defendant was called, and attempted to prove that the report was fair, and that the paragraph was in the nature of fair comment, or that it was in substance true. But no attempt was made to prove the imputation conveyed in the word *quack;* and,

ERLE, C. J.—A party who puts forward inculpatory matter, withholding what is exculpatory, is not excused on the ground either of fair report or fair comment (*a*).

Macaulay contended that Yearsley, the former defendant, was responsible for that.

The plaintiff gave strong evidence of damage; stating that, though he had no property nor money, he was not insolvent, and had a business likely to amount to 1,000*l.* a year at the time of the publication of the libel, which had afterwards declined.

ERLE, C. J., left the case to the jury as against the now defendant, telling them that there was no privilege; that the publication was neither excused nor justified, the epithets used making it inexcusable either by way of report or comment, the plea of justification not being proved; and that the *now defendant* was responsible for any injury which the plaintiff had sustained; and they found a

Verdict for the plaintiff, damages 450*l.* (*b*).

(*a*) See *Lewis* v. *Levy*, 27 L. J., Q. B. 282.

(*b*) *Vide Harrison* v. *Pearce*, Vol. I. p. 567, which was upheld by the Court of Exchequer, and proceeded upon the same principle as the above case, viz., that each of several persons responsible for a tort is liable for the whole amount of damage for the injury sustained, as it may be proved in evidence up to the time of the action against *him*.

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Coram Willes, J.

CLARK *v.* HOWARD.

Sittings after Trinity Term.

On a contract by defendant, on a sale by him of the good-will of a business, that he would not, within a certain time, open any "new business" of the kind; a business having in fact been opened by a servant of defendant, it was left to the jury whether there had been a new business opened, and whether, if so, it was really and substantially the business of the defendant, and carried on on his behalf and for his benefit.

ACTION on an agreement, by which the plaintiff was to take a bakehouse from the defendant, and pay for the good-will; and the defendant undertook not to open any new baking business in the town of Westerham.

Breach, that he had opened a new baking business there.

Plea: denying the breach.

H. James for the plaintiff.

Parry, Serjt., for the defendant.

The defendant had, besides the bakehouse sold to the plaintiff, a corn and chandlery shop in the town, kept for him by a person named Townsend for twelve years; and at which bread baked by the defendant—and after the transfer, by the plaintiff—had been sold.

After the sale to the plaintiff, the defendant sold flour at wholesale price to Townsend, who baked bread, which he sold at reduced price, and ceased to deal with the plaintiff.

The defendant's name was over the shop, and Townsend was still his servant; but his case was, that, as regarded the baking business, it was Townsend's, and carried on for his own profit; and Townsend, being called for the defendant, swore that it was so. Moreover, it was contended on his part, that it was only a continuation of the bread business always carried on at the same shop.

WILLES, J. (to the jury).—The defence raises two questions, both for you. 1. Was there any *new* baking business opened? 2. If so, was it opened by the defendant? That is, did he open, or cause to be opened, a new business? Look at the real character of the transaction, and say whether the business was nothing more than a business carried on by Townsend, or by the defendant under his name? Was the business substantially enlarged and

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altered so as to become a new business? Was it really carried on for and on behalf of the defendant? Was he the person really benefited by it? Was he the real principal or proprietor (*a*)?

Verdict for the plaintiff, 50*l.*

(*a*) Whether a particular business is a breach, may be a question of law, *Kemp* v. *Tober*, 1 Sim, N. S. 517; *Turner* v. *Evans*, 2 De G., M. & G. 740; *Wickenden* v. *Webster*, 25 L.J., Q. B. 264; note the distinction.

Coram Keating, J.

HIBBERD *v.* CHARLES.

Sittings after Trinity Term.

In an action for malicious prosecution, the opinion of the jury on the former trial not material.

ACTION for malicious prosecution on a charge of perjury, on which the plaintiff was acquitted at the Central Criminal Court.

Plea: not guilty.

Parry, Serjt., for plaintiff, proposed to ask him in examination in chief as to an expression of opinion with which the jury at the Central Criminal Court accompanied their verdict, to the effect that the prosecution was malicious and without foundation.

Objected to by defendant's counsel (*a*).

KEATING, J.—The present inquiry and the investigation on the trial of the indictment are not *ad idem*. The expression of opinion of the former jury, that the evidence before them was insufficient, or the charge malicious, in no way helps the plaintiff here; *non constat* but defendant may now be in a position to adduce evidence of reasonable and probable cause, which was not laid before the other jury.

The question was not put.

Verdict for plaintiff, damages 200*l.*

Parry, Serjt., and *Tompson Chitty*, for the plaintiff.

Henry James and *Philbrick* for the defendant.

(*a*) *Barker* v. *Angell*, 2 M. & Rob. 371, cited.

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OLIVER *v.* MORTIMER.

Sittings after Trinity Term.

Cheques being tendered in evidence for the plaintiff, the defendant allowed to prove them post-dated.

COUNT upon cheques, and for goods sold and delivered.

Pleas: denying the making, and the debt.

Simon, for plaintiff, proposed to put in evidence the cheques given to him by defendant in payment for the goods.

Petersdorff, Serjt., for defendant, objected, on the ground that the cheques were post-dated and insufficiently stamped; and he prayed leave to prove this at that stage of the trial.

Simon insisted that since the Common Law Procedure Act, 1854, sect. 28, the Judge or officer of the Court was alone competent to take an objection to a stamp, on the ground of insufficiency; but

Per KEATING, J.—That section is only intended to prevent the revenue being defrauded by an agreement between the parties to admit a document improperly stamped, and in no way abridges the rights of the contending parties to raise an objection to the stamp.

Petersdorff, Serjt., was then allowed to prove that the cheques were post-dated (*a*); which being done,

Simon abandoned the former counts of the declaration, and relied upon the count for goods sold and delivered.

Petersdorff, Serjt., then objected there were no particulars of the plaintiff's claim, and therefore he could not go into that part of the case; but

Per KEATING, J.—There is an issue on the record, which I must try.

Ultimately the plaintiff's counsel submitted to a

Nonsuit.

J. Simon for the plaintiff.

Petersdorff, Serjt., and *Wood*, for the defendant.

(*a*) The objection was not a mere stamp objection. *Vide Dunsford* v. *Curlewis*, Vol. I., p. 702.

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Coram Keating, J.

Sittings after Trinity Term.

HENDERSON *v.* HAYTER.

On plea, *puis darrein continuance*, of settlement after action brought, it is for the jury whether the sum received was accepted in satisfaction of debt *and costs.*

ACTION on the common counts.

Pleas: never indebted, payment and set-off. Issue.

Huddleston for the plaintiff.

Turner for the defendant.

Plea: *puis darrein continuance*, that after action brought, and within eight days, &c., the defendant paid to the plaintiff 11*l.* in satisfaction of debt and *costs*, which the plaintiff accepted and received in such satisfaction. Issue.

The defendant and his attorney were called in support of the plea, and proved that on the day laid they saw the plaintiff, and he agreed to take the sum mentioned for debt and costs.

The plaintiff was called to contradict this evidence.

KEATING, J. (to the jury).—Did the plaintiff accept the sum paid to him in satisfaction of his *costs* as well as of the debt? (*a*)

Verdict for the defendant.

(*a*) *Cook v. Hopewell*, 25 L. J., Exch. 71.

Sittings after Trinity Term.

LOVEGROVE *v.* FISHER AND ANOTHER.

An action maintained by a seed merchant against seed brokers for falsely warranting turnip seed to be rape seed, although it was sold by sample and was of greater value than turnip seed; the plaintiff having sustained actual loss and injury in his business, having re-sold it as rape seed and having had to compensate his customers.

ACTION for falsely warranting seed to be rape seed, whereas it was not so, by reason whereof the plaintiff, who had re-sold it to divers persons as rape seed, was called upon and compelled to pay certain sums in compensation, and was injured in his business, &c.

Pleas: denying the warranty and the breach.

The plaintiff was a seed merchant; the defendants were seed brokers.

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The plaintiff, in August, 1858, went into the market, where the defendant's samples were placed, and said he wanted some rape seed, upon which he was pointed out a sample of seed, and told it was English rape seed. And he bought by that sample. The seed was sent *per* railway according to his directions, and (as suggested by the defendant) the wrong parcel of seed was received.

The plaintiff re-sold the seed to various persons, and they sowed it, but it came up turnips. They complained, and claimed compensation, and he paid them certain sums to avoid litigation.

The evidence on the part of the plaintiff was, that the two kinds of seed, rape and turnip, were so much alike that persons even in the business of seed sellers might easily be deceived; and that even when the seed sprung up the resemblance to turnips was for some time very strong, for which reason it was that none of the sellers discovered the mistake until the seed had sprung up and the plant attained a certain height.

The evidence for the plaintiff also went to show, that, although turnip seed was twice as valuable as rape seed in the market (that is, fetched a price twice the amount), a crop of turnips is not so valuable, for certain agricultural purposes, as a crop of rape.

The plaintiff had paid to customers 53*l.* for compensation.

The case for the defence was, that rape *could* be distinguished from turnip; and that when the plant sprung up the cultivation might have been altered so as to secure the advantage of rape; that therefore the defendants were not the cause of the injury; and that there was no legal damage.

KEATING, J. (to the jury).—Was there a warranty of the seed as rape seed, or was it sold as rape seed?

2. Was there a breach of that warranty on the part of the defendants? Was rape seed sent and delivered at

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the *terminus*, or turnip seed? If the latter, find for the plaintiff.

3. Then, as to damages, if there was a breach of the warranty, and the plaintiff re-sold on the faith of it, and the sums paid by him to his customers were reasonably and properly paid, those sums are recoverable (*a*).

Verdict for the plaintiff, 53*l*.

Lloyd for the plaintiff.

Hannen for the defendants.

(*a*) See *Carter* v. *Crick*, 28 L. J. 238; *Randal* v. *Roper*, 27 *ibid.*, Q. B. 211.

The general principle is, that warranties only apply to latent defects or qualities. Hence, in *Dawson* v. *Collis*, 20 L. J., C. P. 117, MAULE, J., said that a seller cannot warrant a sack of beans to be a sack of peas, it being shown to and seen by the buyer. But this was a case in which the seeds were not distinguishable. The question, practically, was one of damage; for it was admitted that the plaintiff had purchased rape seed, and though it was contended that on a sale by sample there can be no warranty (*Sayers* v. *The London and Birmingham Glass Company*, 27 L. J., Exch. 294), yet in truth it was not a case of *warranty*, strictly so called, but of sale of one article and delivery of another. And therefore the real question was, whether the plaintiff, in re-selling the seed as rape, or the plaintiff's purchasers in buying and sowing it as such, and cultivating it as such after it had sprung up, so far contributed to the injury that it became not the legal and natural consequence of the defendant's neglect in delivering turnip seed for rape seed; and therefore, in effect, the learned Judge so put it, that if the seed turned out to be turnip seed, the cause of action was made out. Being an action, however, for consequential damage, it was necessary, in order to recover such damage, to connect it with the defendant's act or default; and this depended upon whether the plaintiff or his buyers could have discovered the seed to be, what it was, turnip seed; or remedied the mischief when discovered. If not, then the injury arose from their carelessness, and the only damage arising from the defendant's neglect would have been the delay, and the cost of carriage in returning it. *Vide Henley* v. *Woodcock*, Vol. I., p. 532.

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PAXTON *v.* COURTNAY AND OTHERS.

ACTION against executors for work, &c. done by the plaintiff as an undertaker.

Plea: never indebted, except as to 75*l.* paid into Court.

Knowles and *Willoughby* for the plaintiff.

Edwin James and *T. J. Clark* for the defendants.

A custom or usage of trade must, to be binding, be reasonable, and is not so if it is such as honest and right-minded men would deem unfair and unrighteous.

The dispute, being wholly as to amount, and turning on the propriety of certain charges, on the part of the plaintiff, evidence was tendered of a usage in the undertaking business, that undertakers should in each funeral charge the entire original cost of certain articles of funeral feature used (gloves, bands, &c.), although they might be used at other funerals.

KEATING, J.—I will not exclude the evidence, but it is a principle of law that a custom must be reasonable (*a*), that is, that it must not be *un*reasonable. I shall put that to the jury.

The evidence was accordingly given, and at the close of the case,

KEATING, J., told the jury that, in order to find for the plaintiff for the higher scale of charges, on the ground of the alleged custom or usage, they must be satisfied that it was such a custom as was reasonable, that is, such as was fair and proper, and such as reasonable, honest and right-minded men would adopt. If they thought it unrighteous, and so unreasonable, then they ought not to found a verdict upon it.

Verdict for the defendants.

(*a*) In one case MAULE, J., said, as illustrating this principle of law, "It is a usage in the strawberry business to put all the big strawberries at the top of the pottle and all the bad ones at the bottom; but that would hardly be a valid custom as against a purchaser who bought a fair pottle." See *Taylor* v. *Dery*, 7 A. & E. 409; *Jones* v. *Waters*, 5 Tyrw. 351; *Sanders* v. *Jameson*, 2 Car. & K. 557.

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FOTHERGILL *v.* LOVEGROVE.

In trover, when it appears that the defendant has had possession of the plaintiff's goods, and has not in fact returned them when demanded, he will be liable as for a conversion, even though he has not used them, nor in terms claimed them as his; for a jury will be told to look to his acts rather than his words, and the proper course, if he does not claim the goods, is to return them; and if he has not done so before action, to take out a summons to stay proceedings on delivering them up.

TROVER and detinue.

Pleas: not guilty, non detinet and not possessed.

Keane for the plaintiff.

Petersdorff, Serjt., for the defendant.

The plaintiff had lodged in a house of the defendant's, kept by a female housekeeper for him. Having resolved to give up letting lodgings and to eject the housekeeper, she resisted, and had recourse to the plaintiff, who supported her in her resistance. Thereupon the defendant expelled her and the plaintiff, and proceeded to sell the furniture, which was removed by an auctioneer. Among the furniture thus removed were some articles belonging to the plaintiff, who claimed them, and having pointed them out, they were struck out of the catalogue; but in point of fact they had never been returned to the plaintiff, although he had repeatedly demanded them, and they remained at the auctioneer's.

For the defence, it was not denied that the articles were the plaintiff's, but it was contended that there had been no conversion by the defendant.

It was replied, on the part of the plaintiff, that it was for the defendant to return the articles, having wrongfully removed them, and that the proper course for him to take after action brought was to have taken out a summons to stay proceedings upon delivery of the goods, with some trifling sum for damage.

KEATING, J. (to the jury).—Did the defendant detain, or cause to be detained, the goods, so as to deprive the plaintiff of them? If he did not intend to do so, why did he not return them? The proper cousre, even after action, would have been to take out a summons to stay it upon delivery of the goods (*a*).

Verdict for the plaintiff (*b*).

(*a*) *Peacock* v. *Nicholls*, 8 D. P. C. 367.

(*b*) See *Burroughs* v. *Bayne*, 29 L. J., Exch. 185; *Fowne* v. *Lewis*, 7 C. B. 408.

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Coram Martin, B.

PIM *v.* THE EASTERN COUNTIES RAILWAY COMPANY.

Sittings after Trinity Term.

In an action for negligence, the only plea being accord and satisfaction:—*Held*, that the plaintiff was entitled to begin.

ACTION for injury sustained through an accident caused by the negligence of the company's servants in carrying the plaintiff as a passenger on their line.

Plea: that after breach, before action, the company paid to the plaintiff, and he accepted and received, 5*l.* in satisfaction and discharge. Issue.

Pigott, Serjt., for the defendants, claimed a right to begin; but

MARTIN, B.—It is a question of damages, and the plaintiff must begin (*a*).

(*a*) See *Overbury* v. *Muggeridge*, Vol. I. p. 137, note (*a*).

PEARSE *v.* BOULTER.

Trinity Term.

Notice to quit given to a mere collector of rents:—*Held*, not good.

ACTION for use and occupation of a house in Islington, from Christmas, 1859, to Lady-day, 1860.

Plea: never indebted.

Keane for the plaintiff.

H. James for the defendant.

The house being in Islington, the landlord living in Holborn, one C. had collected the rents. The defendant entered in June, 1859, at a rent of 45*l.*, payable quarterly, and had made various payments to the collector on account. At Michaelmas she gave him notice to quit at Christmas, and a few days before Christmas gave up the key to a person who kept the plaintiff's empty houses, and a bill was put up in the house announcing it to let.

H. James, for the defendant, first relied upon the notice to quit; but

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MARTIN, B.—A notice to a mere collector of rents is not sufficient (*a*).

H. James then endeavoured to make out a surrender by act and operation of law; but

MARTIN, B.—There is nothing in that. There was no authority in the housekeeper to receive the key, nor any privity in the plaintiff.

Verdict for the plaintiff.

(*a*) One of the jury strongly expressed his surprise at the ruling, and declared it contrary to common understanding and daily usage; but the reason of the rule of law is clear. It is necessary, to make a notice good, that it should be given to some one whose *duty* it is to send it to the landlord; and, moreover, he should be some one who has authority to reject or accept it; otherwise the landlord might be concluded by a quarter's notice when half a year's notice was required. It is otherwise where (as in a recent case in the Exchequer) the notice was given to a person, an attorney or house agent, who has the *management* of the property, the landlord residing at a distance in the country; *Papillon* v. *Brunton*, 29 L. J., Exch.

WHITMORE AND OTHERS (Assignees of a Bankrupt) *v.* DOWLING.

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An assignment by a trader of all his stock, for a debt and *a further advance*, even although bills, still running, have been given for the old debt; and the bill of sale gives a power of making an *immediate* demand, and seizing and selling in default for the *whole* amount, and this has been acted on before the bills were due, does not give the assignees under a subsequent bankruptcy, on the bankrupt's own petition, any right of action either as an act of bankruptcy or as a fraudulent preference or otherwise.

TROVER, and money had and received.

The plaintiffs were assignees of a bankrupt.

There was no notice to dispute the act of bankruptcy.

Pleas: not possessed and never indebted.

Overend and *T. Jones* for the plaintiffs.

Hawkins, *Hayes*, Serjt., and *Finlason*, for the defendant.

The bankrupt, in January, 1856, was indebted to the defendant in 400*l.*, for which, however, bills had been given, which were still running. On the 23rd January, 1856, he gave the defendant a bill of sale of *all* his stock in trade, &c., reciting the debt and also a further advance

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of 50*l.*; and the deed provided that the defendant might *at any time* make a demand of repayment, and seize and sell on default of payment.

On the 23rd February, 1856, the defendant made a demand for payment of 450*l.*, the *whole* amount due to him, and on default of repayment of that amount, on the 7th March, he seized the stock assigned.

On the 28th March, the *bills not being due*, the defendant sold the stock thus seized, which realized more than the whole amount due, and of which the *surplus* proceeds had been paid to the plaintiffs.

On the 14th November, 1856, there was an adjudication of bankruptcy on the bankrupt's own petition.

MARTIN, B.—There is no case. There is no relation back, where a trader has been made a bankrupt on his own petition (*a*), and the deed was not fraudulent or void.

For the plaintiffs it was contended, that, the old debt not being due and *payable* (the bills being still running even at the time of the seizure), and the power of sale having been given and acted on as to the *whole* amount, the entire transaction was fraudulent and void as against creditors; but

MARTIN, B.—That is not so. There is nothing in the fact that the old debt was not actually *payable*, by reason of bills having been given which were not due. A man may lawfully get security for a debt, whether actually *payable* or not, and it is not any fraud upon other creditors(*b*), nor any act of bankruptcy, if it be partly also in consideration of a further advance (*c*).

Nonsuit.

(*a*) *Monk* v. *Sharp*, 27 L. J., Exch. 29.

(*b*) See *Wood* v. *Dixie*, 7 Q. B. Rep. 892, where it was held that a man may sell his goods to avoid an execution.

(*c*) See *Harris* v. *Rickett*, 28 L. J., Ex. 197; *Bell* v. *Simpson*, 26 L. J., Ex. 363.

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It is the present practice to accede to an application to postpone a cause even on the day on which it stands for trial, on the ground of the absence of a material witness, where the application appears reasonable.

STEVENS *v.* ESLING.

ACTION for necessaries supplied to the wife of the defendant.

Plea, never indebted.

Ballantine, Serjt., for the plaintiff (with him *Prentice* and *Philbrick*), applied at a quarter to three in the afternoon of the day on which the case stood for trial, for its postponement until the next day, on the ground that the wife, an essential witness, by some mistake of the attorney in giving her notice to attend, had not yet arrived.

Power (with him *Bulwer*) for the defendant, resisted the application, on the ground that the cause had stood for trial in Middlesex and had been removed into London, and that the plaintiff had given no notice of the application, but

MARTIN, B.—The modern practice is to allow such applications whenever they appear reasonable. This appears to be so.

Cause postponed.

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It is the right of a plaintiff to be nonsuited at any stage of a cause, even after the defendant has put in evidence.

STEVENS *v.* ESLING.

ACTION for necessaries supplied to the wife of the defendant.

Plea, never indebted.

Ballantine, Serjt., *Prentice* and *Philbrick*, for the plaintiff.

Power and *Bulwer* for the defendant.

The wife was called and made out a *primâ facie* case.

The defendant put in a statement made by the wife when removed from the Ipswich Poor Law Union, and the registry of the birth of a child of hers, in which she described one Harris as the father (*a*).

(*a*) See *Watson* v. *Little*, 29 L. J., Exch.

Ballantine, Serjt., not being able to resist this evidence, proposed to yield to a nonsuit.

Power claimed the verdict for the defendant, as he had put in evidence; but

MARTIN, B.—It is the right of the plaintiff to be nonsuited at any stage of the cause (*a*).

Nonsuit.

(*a*) Subject to the right of the defendant to have any special pleas found, as to which he may be entitled to costs; see *Brett* v. *Philips*, Vol. I., p. 399.

PEARSE *v.* ROGERS.

Trinity Term.

SLANDER. The plaintiff was the same as in the next case: and

Keane, for the plaintiff, challenged one of the jurors in the first instance without assigning cause; but

MARTIN, B.—You cannot, in a civil case, challenge a juror without cause (*a*).

Keane then assigned for cause that the juror in the other case had expressed dissatisfaction at the ruling of the learned JUDGE in favour of the plaintiff.

MARTIN, B.—That is no good cause of challenge.

The case was accordingly tried (*b*).

A juror cannot, in a civil case, be challenged without cause; and it is no cause of challenge that, in a previous case, the juror has shown some dissatisfaction with the law as laid down by the Judge in favour of the party challenging.

(*a*) See *Williams* v. *Great Western Railway Company*, 28 L. J., Ex. 2.
(*b*) See the same case as reported.

PEARSE *v.* ROGERS.

Trinity Term.

SLANDER. The words laid were, "He has forged his father's name to bills of exchange."

Plea, not guilty.

Keane for the plaintiff.

Ribton for the defendant. The words proved were

In an action of slander, an amendment of the words as laid, refused; the variance being, that what was laid as a charge appeared to have been only the statement of a *report*.

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PEARSE v. ROGERS.

"there was a report in circulation that he was out of the way for forgery."

MARTIN, B.—There is a fatal variance.

Keane applied for leave to amend: but

MARTIN, B., declined to allow amendment (*a*).

Nonsuit.

(*a*) The Common Law Procedure Acts, 1852, s. 222, and 1854, s. 96, provide that all such amendments as may be necessary for the purpose of determining, in the existing suit, the *real question in controversy* between the parties, shall be so made if duly applied for. But, in an action in which there is no real question in controversy between the parties, the action being of a trivial character, it is not obligatory upon the Judge to make the amendment for the mere purpose of costs. Moreover, it has been held, that these sections apply to what is the real question before and at the time of suit; and if it appears that the plaintiff was not truly informed of what the defendant has said, there would, again, be *no* question in controversy.

PARNELL *v.* STOCK.

Trinity Term.

In an action for money lent, if it appears that the money was originally advanced on the understanding that it should be repaid, and the only plea is never indebted, the verdict must be for the plaintiff.

ACTION by an administrator for money lent by the intestate to the defendant.

Plea, never indebted.

Lush and *Watkin Williams* for the plaintiff.

Hawkins and *T. Chitty* for the defendant.

The intestate was intimate with the defendant and his wife, who lived near him, and visited him constantly, and not long before his last illness the intestate advanced 300*l.* to the defendant, who sent him an acknowledgment or receipt for the money, as money lent, and to be returned. But after the death of the intestate, and an application being made by the plaintiff as administrator, for repayment (in consequence of an entry in the pocket-book of the intestate), the defendant professed that the intestate had returned him the acknowledgment (which he produced), and declared that he meant it as a *gift*. In the first in-

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PARNELL v. STOCK.

stance, the only evidence being defendant's admission that he had the money. The entry was not admissible (*a*), nor the receipt, as being unstamped: and therefore,

MARTIN, B.—There is no case; thereupon,

W. Williams called the defendant and his wife, who, it was suggested, had got hold of the acknowledgment during the last illness of the intestate. The defendant now admitted that originally he understood it as a loan; but denied that the intestate had spoken about repayment in the first instance, or used the word loan; and

Upon the part of the plaintiff it was contended, that there was clear evidence of a loan in the first instance, and no plea to raise the defence, if there ever was a loan at all, and that there had been no valid gift of the money, if originally *lent* (*b*).

MARTIN, B. (to the jury).—Was the money originally advanced on *loan?* That is, was it originally advanced on the understanding, between both parties (*c*), that it should be repaid? If so, find for the plaintiff; if not, for the defendant.

Verdict for the plaintiff.

(*a*) A loan implies, *ex vi termini*, a contract; *Victor* v. *Davis*, 12 M. & W. 758.

(*b*) *Shower* v. *Pilck*, 4 Ex. 478.

(*c*) See *Reeve* v. *Reeve*, Vol. I., p. 280.

COX *v.* COUVELESS.

Trinity Term.

ACTION for work and labour and materials.

Plea, never indebted.

Hawkins and *Prentice* for the plaintiff.

M. Smith and *W. Williams* for defendant.

The plaintiff was called, and stated that the defendant had employed him as a builder; upon which,

If, in examination in chief, the plaintiff is asked as to the contract, and denies that there was a contract in writing, the defendant may interpose, and give evidence upon a collateral issue (*semble* for the *Judge* to decide) as to whether there was a contract in writing or not before the plaintiff is allowed to give evidence of its *terms*.

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Cox v. Couveless.

M. Smith for defendant interposed, and asked if there was not a contract in writing?

The witness denied that there was.

M. Smith then put a document into his hands, and he was asked whether it had not been signed by his wife with his authority.

The witness denied this.

A letter was then handed to him, and he was asked if he had not written it—and he admitted that he had—but still denied that he had authorized a written agreement.

M. Smith then proposed to call evidence to prove, as a collateral issue (*a*), that the defendant had, by the hand of his wife, executed the agreement; and

Martin, B., allowed that he was entitled so to do, but

M. Smith waived his right to do so; and at the close of the plaintiff's case gave evidence of the contract in writing, upon which, the plaintiff yielded to a

Nonsuit (*b*).

(*a*) For the *Judge*. *Boyle* v. *Wiseman*, 24 L. J., Exch. 284.

(*b*) *Cooper* v. *Dawson*, Vol. I., p. 550; *Bartlett* v. *Smith*, 11 M. & W. 483.

CATLING *v.* PERRY.

Trinity Term.

A contract for the making and sale of bricks above 20*l.*, to be delivered within a year from the time when, according to the *defendant's* evidence, the contract was completed, by a letter of his in answer to a parol proposal:—*Held*, valid; there having been a part acceptance and payment on account.

Action on a contract made in December, 1857, by which the defendant agreed to buy of the plaintiff half a million of bricks of 1857, and two and a half millions more of bricks of a certain sort, to be delivered in 1858, at a price of 28*s.* a thousand. Averment of delivery of part.

Breach: refusal to receive the residue.

Pleas, 1. Denying the contract.

2. The breach.

3. Rescission by mutual consent.

An agreement, dated 3rd November, 1857, was put in, signed by the *plaintiff* (not by defendant), but the plaintiff swore he had *sent* to the defendant; and a letter from the defendant to the plaintiff, dated November 5, 1857, was also put in, in these terms:—

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"I accept your offer for bricks, and will forward agreement for your signature."

And another letter from the defendant to the plaintiff, dated 8th December, 1857, was also put in:—

"Let me know at what time you propose delivering the half million of bricks of 1857, and the two and a half millions, for I want to complete the agreement for your signature."

Bricks were delivered until August, 1858, when, after some correspondence, the defendant refused to receive any more.

For the bricks delivered 307*l.* had been paid, and though some of the bricks were objected to they had been replaced, and the whole number were ready for delivery.

W. Williams, for the defendant, raised the point that the contract was within the 4th as well as the 17th sect. of the Statute of Frauds, and therefore must be signed by the party to be charged, even although there had been part performance or payment (no formal agreement had been signed by the defendant).

The defendant was called and denied that he had received the agreement, and stated, that in his letter of November 5th, he referred *not* to that, but to a verbal contract, on terms somewhat different, but substantially the same.

MARTIN, B.—According to the defendant's own evidence it makes no difference, and the points raised do not arise. He says he never had the written agreement, and that his letters referred to a previous *parol* offer. That does not matter, if the letters contain (or refer to) the terms. Now the last of these letters was dated in December, 1857, and the bricks were to be delivered in and before the end of 1858, so it does not appear that the contract was not to be completed within a year, and the case is not within the 4th section of the statute, and is taken out of the 17th section by the part payment and acceptance. The bricks objected to were taken back and replaced, and the *whole*

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were ready for delivery. It makes no difference as to the main question, whether the defendant signed the agreement or wrote an acceptance of terms proposed by parol, and referred to in his letters. The parties may have intended to have a formal agreement drawn up and signed by both parties, but it does not matter, as the parties acted on the contract made by the letters.

Verdict for the plaintiff.

Hawkins and *Digby Seymour* for the plaintiff.

EMMOTT *v.* RIDDEL.

Trinity Term.

A proposal on one side, not answered by the other, until after a delay of some months, and then not assented to, but some months afterwards acceded to:—*Held*, no evidence of a contract.

THE first count stated that the plaintiff had in his possession a horse, and that one Robert Riddel was indebted to him for its keep; and thereupon, in consideration that the plaintiff would deliver up the horse to the defendant, he promised the plaintiff to pay him the sum so due for its keep.

Averment, that the plaintiff delivered up the horse to the defendant; and general averment of readiness to do all things according to the agreement.

Breach, non-payment of the sum so due.

Second count: *indebitatus* count for the keep of a horse.

Pleas: 1. Never indebted.

2. Denial of the agreement.

3. That the plaintiff did not deliver up the horse to the defendant within a reasonable time in that behalf, according to the said agreement. Issue.

Archibald for the plaintiff.

C. Pollock for the defendant.

The plaintiff was a livery-stable keeper in London; the defendant was a gentleman residing in Devonshire.

In April, 1857, the defendant's son bought a horse (the horse in question), and placed it at livery with the defendant. In October, the son being largely indebted to the plaintiff for the keep of this and the hire of other

horses, the defendant sent to the plaintiff for his account, which was delivered to the amount of 120*l.*

In December, 1857, the defendant, then, as it appeared, personally unknown to the plaintiff, called at the plaintiff's place of business, and inquired after the horse, and shortly afterwards wrote to the plaintiff, thus—

"I called for the purpose of arranging my account, but your conduct determined me to take quite a different course; and I now inform you that I have purchased the horse which my son's servant delivered to your charge, and I am prepared to pay for his keep on your delivering him up. If not, I shall commence an action against you (*a*). I have no objection to your keeping the horse at a price I may approve; but I will not be answerable for the keep of the horse after this notice." No answer was sent.

No tender of the money due, nor any application for the horse, appeared to have been made. Nor, on the other hand, had there been any tender of the *horse*, nor any application for the amount due in respect of its keep.

In March, 1858, the plaintiff sent in his *entire* account as against the son (which had then swelled to 154*l.*), and he accompanied it by a letter to the effect that he would give up the horse on *payment of the son's account;* that is, on payment of the *whole* amount due from the son. And on the 27th March the defendant wrote to the plaintiff that he declined paying it, and also declined to pay for the keep of the horse beyond the date of his notice (in December, 1857), adding that he was still ready to pay the keep *up to that time*, and to receive the horse in order to dispose of it; in which case he would render the plaintiff an account of the proceeds and pay him any surplus.

(*a*) Which he could not have done but for the purchase, even on the order of the son to the livery-stable keeper to deliver up the horse on payment of his lien; *Tollet* v. *Sherstone*, 5 M. & W. 283. But by the transfer the father would be given a right to bring trover; *Philips* v. *Robinson*, 4 Bing. 106; *Reeves* v. *Capper*, 5 B. N. C. 136; *Cheeseman* v. *Exall*, 6 Exch. 341; 20 L. J., Exch. 209.

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In October, 1858, the defendant sent for the horse, and it was delivered up to him.

The plaintiff's attorney then applied to the defendant for payment, which was refused, and the present action was brought.

MARTIN, B.—There is no case; for there is no evidence of a *contract* between the parties. There was no assent by the plaintiff to the offer by the defendant (*a*). Therefore there must be a

Nonsuit.

(*a*) *Vide Hamilton* v. *Terry*, 21 L. J., C. P. 132.

Coram Wilde, B.

MEEK *v.* THE WHITECHAPEL BOARD OF WORKS.

Trinity Term.

An action maintained against a board of works for not keeping a sewer cleaned, whereby it became choked up, and the overflow therefrom ran into the plaintiff's premises, and *quære*, whether the defence of contributory negligence on the part of the plaintiff, though admissible under the general issue, can be established under the Metropolis Local Management Act.

ACTION for not keeping a sewer and gully cleansed, whereby it overflowed, and the plaintiff's premises were filled with foul water, &c. The declaration alleged that the sewer grate and gully were vested in the defendants, and that the plaintiff was possessed of premises near thereto: that the defendants did not keep the sewer grate and gully properly cleansed, whereby it became choked up and overflowed with foul water, &c., which flowed into and over the premises of the plaintiff, &c.

Plea not guilty.

Collier for the plaintiff.

Manisty for the defendants.

The sewers in the district were vested in the defendants under the act (*a*).

(*a*) The Metropolis Local Management Act, 18 & 19 Vict. c. 120. All sewers (except main sewers vested in the Central Board under sect. 135) are vested in the *District* Boards (sect. 68), who are to cause them to be repaired and maintained, &c., for effectually

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The case for the plaintiff was, that on the 24th June the sewer, grate and gully having been choked up, there was an overflow therefrom, which ran into the plaintiff's premises.

It appeared that on that day there was a violent storm of rain.

The case for the defence was, that on the night of the 24th June, there being heavy rain, the gully was found not to pass the water freely, and the overflowing of the sewer came into the plaintiff's premises.

Manisty, for the defendants, offered to prove that the plaintiff himself contributed to the mischief by throwing refuse into the gutter, which helped to stop up the sewer.

Collier objected to that evidence.

WILDE, B.—The evidence is no doubt *admissible* under not guilty (*a*), but it would be of no avail unless it connects the wrongful act of the plaintiff with the breach of duty complained of on the part of the defendants; and looking to the provisions of the act, it hardly appears that the defence can be sustained. They have powers to enforce the removal of any refuse, by whomsoever caused; by neglect of scavengers, or by act of occupiers (*b*). And the very breach of duty charged is not acting on those powers.

draining their respective districts (sect. 69), and to drain and cleanse all sewers and drains, &c., of any filth or water, &c., and to cause notice to be given to any person causing such nuisance, or to the owner or occupier of the premises whereon the same exists, requiring him to cleanse, &c; or if he fail to comply with such notice, then the Board shall cause such works to be done (sect. 86). Every District Board is hereby required to appoint a sufficient number of persons, or to contract with any company or persons for sweeping and cleansing the streets, and for cleansing out and emptying the sewers and drains, &c. (sect. 125); and penalties are imposed on the scavengers if they do not perform their duties, or on any occupier who shall refuse to permit them to do so. The effect of the whole appears to be that the duty is primarily imposed upon the District Board, with plenary and summary powers of *compelling* the performance of it.

(*a*) *Holden* v. *The Liverpool Gas Company*, 3 C. B. Rep. 1; *Howden* v. *Standish*, 21 L. J., C. P. 33.

(*b*) The wrongful *wilful* act of a

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Manisty called witnesses to show that the storm was sudden and the obstruction temporary, so that in the morning no water was standing in the street.

WILDE, B. (to the jury).—Was the overflow caused by neglect of the defendants in not causing the sewers to be kept cleansed, or by a storm so sudden that no reasonable care could provide against it?

Verdict for the plaintiff, 30*l.*

third party, a *stranger*, may be a defence; *Latch* v. *Rhymny Railway Company*, 27 L. J. 7, Ex. 155; but see *Brown* v. *Sergeant*, Vol. I. p. 112.

JARVIS *v.* JACKSON.

Trinity Term.

In an action for false imprisonment of a servant, plea: justifying on the ground of reasonable suspicion that she had stolen some money out of a closet; the substance of the plea being that she was the only person who had entered the closet since the defendant had left the money therein; the plea was allowed to be amended by adding a fact (that the defendant had locked the door) which the defendant had never before mentioned, the *credibility* of the statement being left to the jury.

ACTION for false imprisonment.

Pleas: 1. Not guilty.

2. That the plaintiff was the defendant's domestic servant, and that on the day in question some person had feloniously stolen from the defendant some money out of a cash box in a closet, to which the plaintiff had access. That just before the theft the defendant had left the cash box open in the closet; that the plaintiff was the only person who was known to have afterwards entered it before the theft was discovered; and that upon the discovery, the defendant, suspecting her of the theft, gave her into custody, &c.

The plaintiff's evidence was, that she and her mistress, and other servants, were engaged on the morning in question in looking out linen, &c., from the closet, and that she had occasion to re-enter it after her mistress left it.

The defendant was called, and in the course of her evidence stated that she had locked the closet upon her leaving it, just before the plaintiff was supposed to have entered it; the object of which was to show that the plaintiff had no business to re-enter it; she had never made this statement, however, before.

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Denman, for the plaintiff, pointed out that the plea contained no statement of the fact now stated by the defendant; and

WILDE, B., said this was material, as the plea must set forth all the grounds of suspicion relied on.

Russell applied to amend; to which

WILDE, B., assented; and the plea was amended accordingly, telling the jury that they were to consider how far the statement was entitled to *credit*, never having been made before.

Hawkins and *Denman* for the plaintiff.

F. Russell and *M'Intyre* for the defendant.

Verdict for the plaintiff, 30*l*.

STEPHENS *v.* REYNOLDS.

Trinity Term.

ACTION on a bill of exchange, drawn by one Ford, directed to B. Reynolds, at Woolwich, and accepted "B. Reynolds."

Plea: denying the acceptance.

Hawkins, Murphy and *Willoughby* for the plaintiff.

Parry, Serjt., and *Joyce*, for the defendant.

The case had been tried *coram* BRAMWELL, B., who directed a nonsuit (vide Vol. I. p. 739), set aside by the Court; dissentiente, BRAMWELL, B. *Vide* 29 L. J., Exch.

The bill was drawn for goods supplied to a partnership business, carried on by one Crane and Reynolds, at *Walworth*. The bill was accepted by Crane, and the plaintiff gave evidence that the defendant Reynolds had said that Crane was his partner, and that whatever he did was the same as if he, Reynolds, had done it.

For the defence it was contended that there was no evidence of authority to accept in such a style, in the name of Reynolds only, and that the direction of the bill to

A partner may be liable on a bill accepted in his name alone, by his partner, for partnership purposes, although directed, not to the partnership place of business, but to the defendant's own place of business, provided the jury find that the partnership business was carried on under the name of the *defendant* alone.

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Woolwich, the place where the defendant carried on his *own* business, and not to Walworth, where the partnership business was carried on, showed that it was not drawn or accepted for partnership purposes.

Bills were put in by the plaintiff, accepted in the same way, and paid by the defendant.

WILDE, B. (to the jury).—1. Were the defendant and Crane partners in trade?

2. Or did he hold himself out as such?

3. And was the bill drawn and accepted for partnership purposes, and in the partnership name?

Verdict for the plaintiff.

Judges' Chambers, coram Willes, J.

FURLONG *v.* GARRETT.

Trinity Term.

Notice of trial may be given with replication if it is only in *denial*.

SUMMONS on the part of the plaintiff (after issue joined) to amend the declaration.

It was objected that there would not be time for notice of trial; notice having been given with the *replication* (in denial), which, it was contended, was irregular.

Sed per WILLES, J.—The notice was quite regular; the replication having been only in *denial;* no formal joinder of issue being required.

Order for leave to amend.
Notice of trial to stand.

Watkin Williams for the plaintiff.

Bennett for the defendant (*a*).

(*a*) See C. L. P. Act, 1852, s. 79. Whatever the *form* of the last pleading, if it is in substance in denial, it is an issue.

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NORTHERN CIRCUIT.

Newcastle, coram Hill, J.

WILSON *v.* REED AND OTHERS.

Spring Assizes.

The publication by a Reform Committee of a report imputing to the plaintiff that he had been guilty of bribery:—*Held*, not privileged, within the rule of law allowing discussion of matters of public interest, the privilege not extending to imputations upon personal character, going, in the opinion of the jury, beyond the necessity for discussion of the public question.

LIBEL. The declaration charged that the defendant wrote and published of the plaintiff in a newspaper, a report of a committee of the *Northern Reform Union*, stating: "The first exposures of the Union having failed to produce any improvement in the mode of conducting elections in Berwick, and the persons there who traffic in votes being utterly impervious to public opinion, we have submitted the evidence to the best legal advice we could obtain, and in accordance with that advice have issued writs against the following persons," mentioning the *plaintiff* among others. And then it was added among the comments, "In a few days writs will be issued against another list of offenders."

Plea, not guilty.

James and *Kemplay* for the plaintiff.

Temple and *Udall* for the defendant.

The defendant and another person, secretaries of the committee, had caused the report in question to be published in the newspaper, bearing their signatures as secretaries.

The publication having been proved.

Temple, before going to the jury, said he would ask his LORDSHIP whether he would say (*a*) there was sufficient

(*a*) It is now settled, that it is for the Judge to say if the occasion is privileged, and for the jury whether the particular publication goes beyond it. See *Dickson* v. *Wilson*, Vol. I., p. 419, and *Beatson* v. *Skene*, 29 L. J., Exch.; *Wenman Ash*, 22 L. J., C. P. 190.

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on the face of the alleged libel to show that it was intended to impute bribery to the plaintiff.

HILL, J.—The *law* is, that a publication without lawful excuse, which tends to hold an individual up to hatred, ridicule or contempt, is a libel. Whether the publication held up the plaintiff to hatred, ridicule or contempt, is a question for the jury. Whether there is an excuse or not is, in the first instance, a question of law. There is, indeed, a rule which I may state to the jury, that it is allowable to discuss matters of public interest in the columns of the newspapers, but it must be done *bonâ fide* and without malice, or anything beyond what is necessary for public discussion.

Temple having thereupon gone to the jury, calling no witnesses,

HILL, J. (to the jury).—The defendants have admitted that they were the persons that caused this publication to be inserted in the newspaper, and the question is whether it was or was not a libel; and if you should find in your judgments that it was, then you will have to say what damages the plaintiff is entitled to. Any publication which exposes an individual to hatred, contempt or ridicule, being published without lawful excuse, is a libel; and I tell you as a matter of law, this committee of the Northern Reform Union, publishing a report which they had received from a sub-committee, did not constitute an excuse in law. It would be a lawful excuse to publish something on the character of another if a person was applied to by a master, and the person gave a bad character, without any actual malice. In the same manner, a person might present a memorial to the Secretary of State on some matter of which he had cognizance; although it might reflect on some individual, if without malice, it would be no libel. In like manner, a petition to Parliament might introduce similar matter, but which the law would call lawful and

justifiable. But the mere publishing in the columns of a newspaper something as to the character of another is a self-imposed duty, and does not constitute a lawful excuse in law within the meaning of the rule to which I have referred. There is, however, another rule, that it is lawful to discuss in the columns of a public journal matters of public interest, provided it be done *bonâ fide*, without actual malice, or the unnecessary making of personal imputations on any individual. The defendants had no right, however, when they professed to discuss in the columns of a newspaper, to make a personal imputation on another individual. Therefore, adopting the rules of law I have stated to you, it will be for you only to say in this case whether this was or was not a libel reflecting on the character of Mr. Wilson. It appears this all arose out of the last Berwick election, and according to the statement made by the defendants themselves in this publication they were a committee of the Northern Reform Union, and constituted themselves into a vigilance committee in order to watch the proceedings, and this letter was in the form of a report of the Reform Union; and it certainly did in most unmeasured terms (though it might be quite honestly) charge the parties who were interested in carrying on that election with the most wholesale bribery; and then they summed up by saying, "the first exposures of the Union having failed to produce any improvement in the mode of conducting elections in Berwick, and the persons there who traffic in votes being utterly impervious to public opinion, we have, as above stated, submitted the evidence to the best legal advice we could obtain, and in accordance with that advice have issued writs," and then they mentioned the names of the parties, including the present plaintiff. They then state "that in a few days writs will be issued against another list of offenders." It will be for you to say, looking at this publication, if it did not in the plainest manner impute to

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the parties who had been selected that they had been guilty of corrupt practices at Berwick election. If you are satisfied such an imputation was made, you will have to consider whether it was not calculated to expose Mr. Wilson to hatred, contempt and ridicule. Then it was urged by the learned counsel for the defence that all this was done from the sense of duty; and though, no doubt, as I have said, it was a self-imposed duty, the motives might be pure and sincere, and if so you ought not to visit the defendants with serious consequences. I suggest to you, however, that any self-constituted body, which sets itself up for the reform of the public, whether in religious, in commercial or in political points of view, must be extremely cautious in all their publications and writings concerning private individuals not to reflect on private character (*a*). A man stands at fearful odds when he has to contend with a public body. If they publish that which reflects on the private character of individuals, they should be very careful of the contents of what they put forth. The question for you is very simple. Did the publication or did it not constitute a libel within the meaning of the rule laid down? If it did, then you will find a verdict for the plaintiff, and say what damages he is entitled to.

The jury then retired, and, after being absent some time, returned into Court, when the foreman said they returned a verdict for the plaintiff, with the smallest amount that would carry costs.

HILL, J.—You will have to define the amount of damages, and the costs are not an element to enter into our consideration (*b*).

The Foreman.—Can you tell us what is the smallest amount that will carry costs?

(*a*) *Vide Paris* v. *Levy, ante*, p. 74.

(*b*) *Vide Wakelin* v. *Morris, ante*, p. 26.

HILL, J.—No, I cannot tell you; that is not an element, however, that is to enter into your consideration.

The jury then retired, and ultimately returned a

Verdict for the plaintiff, damages 1*s.* (*a*).

(*a*) In the above case, it will be seen the direction proceeded upon precisely the same *principle* as *Paris* v. *Levy*. *There* the alleged libel consisted of *comments*, the jury thought just, on a *publication by the plaintiff*; *here*, on the other hand, the defendants had, without necessity (for the names were not essential), *published* statements as to the private conduct of the plaintiff. See *Davis* v. *Cutbush*, Vol. I. p. 487.

REGINA *v.* GREGORY AND ANOTHER.

Spring Assizes.

An explosion having occurred on board a steamer, whereby one of three persons in charge of her was killed:—*Held*, that the circumstance that the valves, &c. were out of order, was not sufficient to make out, against either or both of them, (one being master and the other engineer), a case of such culpable negligence as would sustain a charge of manslaughter.

EMANUEL GREGORY, steam-tug master, and James Campbell, engineman, were charged upon the coroner's inquisition with the manslaughter of John Cockburn, at the parish of Tynemouth.

Price and *Mulcaster* for the prosecution.

Seymour for the defence.

Price, in opening the case, said, as it involved considerable difficulty, perhaps his Lordship would direct his attention to the facts of the case, and state his opinion as to whether it should proceed further than the opening. No doubt the offence charged could not be considered a joint offence; it must, upon the evidence, appear to have been the result of an act done by one or other of the prisoners. Deceased was the stoker on board the steam-tug *William and Mary*, of which the prisoners were the captain and engineman. There was no doubt that the steam-tug had exploded, that the deceased was blown into the air, and that his death ensued either from drowning or scalding. The two prisoners, with the deceased, were the only persons on board the steam-tug. On the 24th of August last the *Louise Crawshay*, a steamer which had recently been

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started for the conveyance of passengers between Newcastle and Tynemouth, was passing down the river to Tynemouth. This steamer had created some little annoyance to other boats on the river by going at a greater speed, and being therefore likely to get all the passengers. On the 26th of August she started from Newcastle about noon. Soon after she started, the steam-tug *William and Mary* started also. The steam-tug was constantly running ahead of the passenger boat, and from the volumes of smoke which constantly issued from the former, and also from expressions used by its captain, it was evidently the desire of the steam-tug to keep ahead of the *Louise Crawshay* and annoy the passengers on board by smoke. When the *Louise Crawshay* left Hebburn Quay, where she had stopped to take up or deposit passengers, the steam-tug again begun to run a race with her. Soon a peculiar coloured smoke was observed to issue from the funnel of the steam-tug, which immediately blew up, and the deceased was blown into the air.

Now the question in the case is, who is responsible for the death of the deceased? Was death merely the result of accident? Or was it the result of some culpable act, or omission of duty, on the part of one or both of the prisoners? The captain and engineman, the prisoners, were in charge of the vessel along with the deceased. It was afterwards discovered, on the steam-tug, that the lever of the safety-valve was so tied down by weights that it could not act as a safety-valve. There was, therefore, considerably more pressure upon the boiler plates than they could bear. Now there was nothing to have prevented any of the three men on board the steam-tug removing the weights. But there was a Government valve, to which there was a lock, fitted by two keys. One of the keys was kept by a Government inspector; and the other ought to have been in possession of the captain. There is no proof that he had the key at the time of the

explosion; but it was afterwards found that the Government valve was in such a state that it could not work. If it had been working no mischief could have occurred. Now it is always assumed that the captain had control of the whole boat. Is he to be considered guilty of culpable neglect in not seeing that the Government valve was in order? Or, in allowing the steam-tug to go at a greater speed than was necessary? Or, in allowing the other valve to be in a state in which it could not work? With regard to the engineer, his duty was to attend to the working of the engine. He was bound to see that too much steam was not generated; whilst the deceased fireman only acted under the control of his two superiors. Now the law of the case is, that a mere omission of duty does not render a man liable to conviction for manslaughter, unless it amounts to a culpable neglect on his part, to which the death can be clearly traced (*a*). It remains for his LORDSHIP to express his opinion whether, from his opening statement, such culpable neglect can be proved?

HILL, J.—What is the act, either of omission or commission, which you point out as possibly to be regarded as culpable?

Price.—The omission is, that the captain, who must have seen the safety-valve out of order, allowed it to be so, and did not put it in working order.

(*a*) *Vide Regina* v. *Hughes*, 26 L. J., M. C. 202, where a banksman, whose duty it was to place a stage on the mouth of a shaft to receive a loaded truck, and who neglected to do so, whereby the truck ran down and killed a workman, was held guilty of manslaughter, but that was after verdict, and the jury had found, on sufficient evidence, that the death arose from the culpable omission of the prisoner. And there, *per* Campbell, C. J., if the omission was not malicious and arose from negligence only, it is a case of manslaughter. The death of the deceased was the *direct consequence* of the *omission of the prisoner* to perform the duty.

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HILL, J.—At present the difficulty is to show that either of the prisoners were in a position to see that it was out of order. Moreover, there is nothing in your statement inconsistent with the assumption that deceased himself could see it to be out of order (*a*).

Price.—The stoker was not where he ought to have been, down in the hold; he was on deck.

HILL, J.—You must make out a decided and culpable neglect of duty on the part of one or both of the prisoners. Now it is perfectly possible that the fireman might have put the valve in order without the intervention of either of the prisoners. If so, it is clear you could not make out a felony. I do not think it was a case which could result in conviction, and therefore I direct a verdict of

Not guilty.

(*a*) *Vide Dynen* v. *Leach*, 26 L. J., Ex. 221.

NORTHERN CIRCUIT.

York, coram Martin, B.

1860.

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REGINA *v.* BOYES.

A witness, an accomplice in a criminal offence, who has received the pardon of the Crown under the Great Seal for that offence, has no privilege of refusing to answer questions relating to the offence, which may tend to criminate himself. He is bound to answer.

THIS was an ex-officio information filed by the Attorney-General, charging Daniel Boyes with having given bribes to six persons at the last Beverley election, to induce them to vote for Mr. Ralph Walters, one of the candidates at that election. The information was filed under the Corrupt Practices at Elections Act (17 & 18 Vict. c. 102), which provides, that no expenses at elections but those allowed by the election auditor shall be legal, and subjects persons guilty of bribery to a criminal prosecution.

The *Solicitor-General, Overend*, Q.C., *Monk*, Q.C. and *Cleasby* for the plaintiff.

Edward James, Q.C., *Price* and *T. Jones* for the defendant.

The facts of the case were these:—At the last election for Beverley there were four candidates, Mr. Walters, Major Edwards, Mr. Walker and Mr. Glover. Mr. Walters and Major Edwards were returned, and on a petition Mr. Walters was unseated. The inquiry resulted in the election committee recommending to the House of Commons that the defendant and another person should be prosecuted. The charge against the defendant was, that he had offered money as bribes for their votes to six persons, as the friend of Mr. Walters. The defendant was an innkeeper in Beverley, and a person of considerable local influence, and had been in the corporation for twenty years, and held strong political opinions. Mr. Boyes had a

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house empty which faced in two streets, one side in "Toll Gable." The people entered in Toll Gable, and proceeded into an inner room where Mr. Boyes was seated, and exchanged some words, intimating that they were voters. They were then motioned to proceed to the next room, and expressions were used which could be heard in that room. There was a man in the second room well supplied with sovereigns. Mr. Boyes mentioned a sum, and the voter received that sum from the man in the inner room. Having received the money in this way, the voters passed out into the other street in which the house stood, called "Walker Gate."

Formal proof having been given of the election and return of Mr. Walters and Major Edwards at the election on the 29th April, 1859, and of the register of voters,

John Best, a carter at Beverley, was called and proposed to be examined as having received a bribe in the manner indicated.

MARTIN, B., addressing the witness said,—I feel bound to tell you, after hearing the opening of the learned Solicitor-General, that by the law of England you are not bound to state anything in answer to questions which may criminate yourself. You may answer or not at your pleasure.

He was then asked, Do you know Mr. Boyes?—I decline answering that question.

The *Solicitor-General.*—I will relieve this gentleman of any difficulty as to that, as I have her Majesty's pardon for any offence relating to the election which he may have committed. (The parchment document, with the Great Seal attached, was tendered in Court to the witness as his protection.)

MARTIN, B. said, it was the first instance of the kind he had heard of. If an authority were shown to him he would act upon it.

The *Solicitor-General* referred his Lordship to *Regina*

v. *Reading* (*a*); *Roberts* v. *Allatt* (*b*); *Regina* v. *Earl of Shaftesbury* (*c*); *Taylor on Evidence* (*d*); *Fawcett* v. *Munro*, not reported, tried at the Old Bailey.

Overend would ask his Lordship whether he would not now tell the witness that he had a pardon and was bound to answer.

MARTIN, B., said he must see the cases and make up his mind. It was a strong thing to commit a man for not answering. There could, however, be no harm in telling the witness he had a pardon.—(Addressing the witness)—That paper is a pardon to you, so that you can never be prosecuted for this offence. Does that make any difference in your wish to answer or not?

Witness.—I don't wish to answer any questions.

Overend submitted that the witness had not the privilege to refuse to answer.

The authorities referred to were then sent for.

After much discussion on the point, his Lordship got the case *Reg.* v. *Reading* (*a*), and said it was directly in point that the questions could not be asked, even if the witness had his pardon, "as it would be a calumny upon him, and his name would suffer." Was the decision right? Then, was there corroboration of the witnesses' testimony?

The *Solicitor-General* said there was abundant corroboration. Several distinct acts of bribery would be proved, and after the first they were not accomplices of Boyes.

MARTIN, B. said, he was in great doubt about the matter, and went to consult with Mr. Baron WILDE. On his return his Lordship said, he had consulted with WILDE, B., and the impression on his mind was that the witness was bound to answer.

(*a*) 7 Howell's St. Tr. 296.
(*b*) M. & M. 192.
(*c*) 8 Howell's St. Tr. 817.
(*d*) § 1072.

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The witness was then recalled, and told by his Lordship he was bound by law to answer.

The case then proceeded and the witness was examined, and proved that he entered the house in question and went through to a back room, Daniel Boyes was in the second room, standing up. There was a table before him, and newspapers or something. He spoke to witness. He said, "Now my lad, how is thou going to be?" Witness said, "Single, Walters." I said I should want to be a runner. He said, "Get away with thee through that door backway into Walker Gate," and he showed me the way to the door. In going to the back door in the next room where Boyes was sitting, there was a person sitting, who put out his hand, and said, "Here lad," and gave me a sovereign. Nothing was said more, and I went away.

Other similar acts of bribery of voters were proved, the defendant being the person authorizing the giving of the money.

The defendant was found guilty.

Liverpool, coram Wilde, B.

KERFOOT *v.* MARSDEN.

Summer Assizes.

In an action for breach of promise of marriage, the plaintiff may ask in a general way as to the amount of the defendant's property; but cannot give evidence of the particular items of his property and their value.

THIS was an action for a breach of promise of marriage, brought by the plaintiff, the daughter of a farmer, against the defendant, a manufacturer, and said to be possessed of considerable property.

Proof was given that the defendant paid his addresses to the plaintiff and had promised her marriage, and that afterwards she had a child, the defendant procrastinating the performance of his promise under the pretext that his house was not yet completed. He afterwards refused to fulfil his promise.

To prove the value of the contract which the plaintiff had lost, and the defendant's ability to pay heavy da-

mages, on the part of the plaintiff evidence was tendered that the defendant had entered into various contracts for the purchase of lands, and also for the purchase of his house. This was objected to by the defendant's counsel.

WILDE, B.—You may ask in a general way as to the defendant's property, but you cannot go into particular items as to his property. If you like I will admit the items subject to objection.

The questions as to the items objected to were not pressed.

Verdict for the plaintiff, damages 500*l.*

Monk, Q.C., *Milward* and *FitzAdams* for the plaintiff.

Overend, Q.C., and *Newton* for the defendant.

Coram Martin, B.

CHAPMAN *v.* CALLIS.

Summer Assizes.

Memoranda made preliminary to the execution of a formal contract, but not included in terms in the bill of sale subsequently executed in pursuance of the preliminary agreement, are not necessarily displaced, and do not necessarily cease to have effect, or to be admissible in evidence upon the execution of the more formal contract.

THE declaration stated that the defendant bought from the plaintiff sixteen sixty-fourths of the vessel *Conrad*, the defendant to have all the profits and to bear all the liabilities to which plaintiff was entitled and liable respectively as owner thereof, from his (plaintiff's) purchase from one Thomas Chapman. It further stated that a liability had arisen within the meaning of the contract to the amount of 39*l.* 4*s.* 11*d.*, which plaintiff had duly discharged and which defendant refused to repay.

The material plea was a denial of the averment that any liability of the plaintiff within the contract had arisen.

The facts were:—On the 4th June, 1858, plaintiff (Alfred) had purchased from Thomas Chapman the sixteen sixty-fourths in question under a letter of agreement, taking upon himself the "liabilities, debits or assets after the vessel's discharge."

The vessel was discharged at Swansea on the 30th July,

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CHAPMAN v. CALLIS.

1858. No bill of sale under the Merchant Shipping Act (17 & 18 Vict. c. 104, ss. 55, 57, amended by 18 & 19 Vict. c. 91, s. 11) was executed until 14th September, 1858.

Between the dates last mentioned, namely, 30th July and 14th September, 1858, the liability in question arose, and was discharged by the plaintiff.

On the 30th September defendant agreed, by letter of agreement, to take from plaintiff (Alfred) the sixteen sixty-fourths which he (plaintiff) had bought from Thomas Chapman, and the letter contained this clause: "and I take all liabilities or profits on the said share from the time of your purchase from Mr. Thomas Chapman, for which you are liable as owner in any way, or entitled to, if any, profits or balance in your favour." On the day on which this letter of agreement was signed, a formal bill of sale was entered into between plaintiff and defendant.

In the progress of the cause it was objected by *Brett*, for the defendant, that neither the agreement of the 4th June, 1858, nor that of the 30th September, 1858, could be received in evidence. He submitted that, upon the execution of the bill of sale of 14th September, 1858, the previous memorandum ceased to have any legal existence between the parties, or at all for the purpose of evidence. He contended that the memorandum of 4th June, 1858, could not be looked at. He submitted, in like manner, as to the memorandum of 30th September, 1858, that it was displaced for all purposes by the bill of sale subsequently executed on the same day.

Mellish and *Charles Russell* for the plaintiff, on the contrary argued that the question of the admissibility of the memoranda of 4th June and 30th September, respectively, depended mainly upon the intention of the contracting parties; and that, in the present instance, the stipulation in both memoranda as to the time from which the liability of the buyer was to run was a collateral point not

touched on, and which could not, under the Merchant Shipping Act, 1854, ss. 55, 57 (17 & 18 Vict. c. 104, as amended by 18 & 19 Vict. c. 91, s. 11) be included in the formal bill of sale. It was, therefore, clear that there could have been no intention to give up an important item in the terms of the original contracts of sale.

MARTIN, B.—I think preliminary memoranda leading to a formal contract are not necessarily displaced, and do not necessarily cease to have effect or to be admissible in evidence upon the execution of the more formal contract. The parties could not have put this term of their agreement in the bills of sale, and it seems to me clear they intended that that term should still be in force even after the bill of sale. There is nothing in the Merchant Shipping Act to make collateral agreements illegal. I shall admit these memoranda, and reserve the point for the defendant if he pleases to move to enter a nonsuit (*a*).

Verdict for plaintiff for the amount claimed.

(*a*) See, on the point referred to, *Harris, Assignees*, v. *Rickett*, 4 H. & N. 1, which supports the learned Baron's ruling. This point was reserved, as well as the question of what was the meaning to be given to "owner" in the memorandum of 30th Sept. 1858, having regard to the operation of 17 & 18 Vict. c. 104, and of 18 & 19 Vict. c. 91. The case was in the Common Pleas. See on the latter point the case of *Liverpool Borough Bank* v. *Turner*, 6 Jurist, N. S. 935.

Coram Wilde, B.

IRLAM AND ANOTHER *v.* DUNN.

Summer Assizes.

On an issue taken on a plea raising a failure of a contract by reason of non-approval of an engineer, an amendment, by replying a waiver, not allowed (*a*), as raising a new question.

ACTION on bills of exchange, and also on the common count for goods sold.

Plea to the counts on the bills—that they were given in consideration of a contract to supply certain "turn-tables,"

(*a*) *Vide Evans* v. *Whittingstall* and *Lynn* v. *Comer*, *post*.

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IRLAM and Another v. DUNN.

to be of the best materials and workmanship and subject to the inspection and approval of a certain engineer.

Averment, that the plaintiffs never sold or delivered to the defendant such tables according to the contract, but, in pretended performance thereof, had delivered certain tables of bad materials, and what had never been accepted by the engineer or by the defendants. Issue.

Monk and *Ovens* for the plaintiffs.

Edward James and *Mellish* for the defendant.

The turn-tables were for the use of a railway company, as the plaintiff knew, but he did *not* know for *what* company. The contract ran thus:—

"The whole to be, &c., and subject to the engineer's inspection before being passed."

Monk contended that this did not mean the *defendant's* engineer; but,

WILDE, B., ruled that it did; reserving the point.

It appeared that the defendant's engineer had never inspected or approved.

Monk then applied for leave to amend, by replying a waiver; but,

WILDE, B., refused; as the effect would be to raise a totally new question(*a*); and thereupon

Monk yielded to a

Nonsuit (*b*).

(*a*) See *Wilkin* v. *Reed*, 15 C. B. 145, and other cases cited, Finlason's Com. Law Proced. Acts, 160.

(*b*) The Court of Exchequer granted a rule nisi, but it was, on argument, discharged. The rule, however, was on the construction of the contract, and for judgment *non obstante veredicto*, which Court held could not be after a *nonsuit*; but they doubted if the plea was good.

1860.

WESTERN CIRCUIT (*a*).

Coram Keating, J.

BANKS *v.* DEAN.

Summer Assizes.

Notice of an application to enter the cause after the expiration of the usual time should be given to the opposite party.

PHILIP SMITH applied for permission to enter the cause. The record had arrived by post that morning before the time for entry of causes had expired, but had not come to the hands of the plaintiff's agent till after that time.

No *ne recipiatur* had been entered.

KEATING, J.—You should have given notice to the defendant's attorney, and that would have fixed him. The difficulty is, that not finding the cause entered he may have left. You had better try to find him, give him notice of your application, and renew it.

On inquiry it was found that the defendant's attorney had not been there. He was then telegraphed to, and telegraphed back that he did not consent to the application, which, being renewed, was granted.

Cause undefended.

Verdict for the plaintiff.

HALLER *v.* WORMAN.

Summer Assizes.

A statement by counsel on attending a summons before a Judge at Chambers, is admissible in evidence as an admission by his client, though not relating to the subject-matter of the summons.

DETINUE for papers.

Pleas: non detinet and not possessed.

In proof of the second issue the plaintiff offered evidence that, on attending a summons to change the venue, counsel for the defendant had stated that there ought to have been a plea of lien and that he wished to add one, that the defendant had the papers in his possession and detained them for work done.

(*a*) Reported by J. B. Rowley, Esq.

1860.

HALLER v. WORMAN.

Collier, for the defendant, objected that this was not a statement on the subject-matter of the summons, and that the admission was not one, therefore, that he was authorized to make, so as to bind the defendant thereby.

KEATING, J.—I think it is evidence of an admission by the defendant of the custody of the papers under the issue of not possessed.

Verdict for plaintiff.

Montague Smith and *Prideaux* for the plaintiff.

Collier and *Cole* for the defendant.

TUPPER *v.* FOULKES.

Summer Assizes.

Where a special authority is necessary to the validity of an act, and a party admits that he had authorized the act, the Court will presume a proper authority.

TO prove the defendant's execution of a deed, one purporting to be executed by his son on his behalf was produced, and evidence was given that the defendant had said, in answer to questions, that his son had authority from him to execute the deed, and that he adopted his act. He was not asked whether such authority was or was not under seal.

Collier objected that it was necessary that the authority should be under seal, and that there was no evidence that it was.

KEATING, J.—The defendant stated to the witness that his son had authority to execute the deed. In the absence of any evidence to the contrary I shall presume that that is the proper authority.

Verdict for the plaintiff.

Montague Smith and *Coleridge* for the plaintiff.

Collier for the defendant.

1860.

NORTH WALES CIRCUIT.

Chester, coram Byles, J.

APPLETON *v.* MORREY AND ANOTHER.

Spring Assizes.

Waste land of a parish, into occupation of which a person has been let, under license of the majority of the parish freeholders, under an agreement to pay rent to churchwardens and overseers, in aid of the poor rates, as parish land, which they may recover under 59 Geo. 3, c. 12, s. 14, after notice and demand of possession, and *semble*, that they may expel him, without resorting to the statutable procedure.

TRESPASS for entering land of the plaintiff and taking his cart, &c.

Plea: not guilty by statute 24 Geo. 2, c. 44, s. 6 (*a*); 59 Geo. 3, c. 12, s. 17 (*b*).

Brandt for the plaintiff.

Welsby and *M'Intyre* for the defendants.

The plaintiff, being called, proved that he had occupied the place—a piece of ground inclosed from the waste—for eleven years, under an agreement in writing between him and upwards of twenty freeholders of the parish, in-

(*a*) No action shall be brought against any constable *or other officer* for anything done in obedience to a warrant of a justice till demand and refusal of a copy of the warrant, &c. "Other officer" includes overseer.

(*b*) The statute vesting parish lands in the churchwardens, &c. as a *quasi* corporation for that purpose, *Gouldsworth* v. *Knight*, 11 M. & W. 337, provided the lands, &c. are not held on any *special* charitable trusts with existing trustees, see 8 Q. B. Rep. 394. Sect. 24 enacts, that if any person, who shall have been permitted to occupy any parish or town house, or any other tenement belonging to or provided by or at the charge of any parish, for the habitation of the poor thereof, or who shall have unlawfully obtruded himself, &c., shall refuse to quit the same and deliver up possession thereof to the churchwardens and overseers, within one month after notice and demand in writing for that purpose, signed by such churchwardens and overseers, or the major part of them, shall have been delivered to the person in possession, or, in his or her absence, affixed to some notorious part of the premises, two justices of the peace, upon complaint made by the churchwardens, &c., may issue their summons to the person to appear, such summons to be delivered to the party, or, in his absence, to be affixed, &c., seven days at the least before the time appointed for hearing such complaint, &c., and if they adjudge it to be true, they may issue their warrant, &c.

1860.

APPLETON v. MORREY and Another.

cluding one of the defendants, and signed by them, but *not* by the plaintiff, letting to him a piece of land from the waste for ninety-nine years, at 5*s.* a year, to be applied by the overseers in aid of the poor rates (*a*). In cross-examination the plaintiff said he did not claim the waste, that the waste land was all parish land. He had not paid the rent, and was not a freeholder.

On the 13th January written notice to quit the place within one month, signed by the churchwardens and overseers, was given to the plaintiff. He did not leave, and on the 5th March, 1854, he was served with a summons under the statute 59 Geo. 3, c. 12, reciting that he had unlawfully obtruded himself into a plot of land, &c. belonging to the township of B., and that he had been served with notice and demand of possession, and citing him to appear before two justices on the 15th March. The summons was left at his house with his servant, he not being at home. He appeared, and the justices issued their warrant to the constables of the township to cause possession to be delivered. One of the defendants was the churchwarden, who attended with the other defendant, a constable, to execute the warrant, which was the trespass complained of. The plaintiff was expelled, the railings of his inclosure pulled down, and his cart removed towards the plaintiff's house.

Brandt submitted that the service of the notice was insufficient; but

Welsby urged that, if it was not, there was a good defence at common law.

(*a*) By sect. 25 of the stat 59 Geo. 3, it is enacted, that if any person shall unlawfully hold possession of any parish land, or hereditaments belonging to the parish, or to the churchwardens and overseers, they may, after such notice and demand of possession as by the act directed in the case of parish houses, exhibit a complaint, &c., before two justices, who are authorized to proceed thereon, and if they adjudge the same to be true, to cause possession of such land to be delivered to the churchwardens and overseers, &c.

1860.

APPLETON v. MORREY and Another.

BYLES, J.—The only question for the jury is, whether the cart was removed to an inconvenient distance.

It must be taken that the land was parish land, and the plaintiff had been allowed to occupy it under an agreement void at law, and creating only a tenancy at will to the churchwardens and overseers. He occupied it only by license of the majority of the parish freeholders. The defendants have a good defence at common law, independent of the statutable procedure (*a*). They had a right to re-enter, having terminated the will; and if they had a right to enter, they had a right to cut down the pales and remove the cart to a convenient distance. Did they do more than that?

The jury found that the defendants removed the cart to a convenient distance, whereupon the learned Judge directed a

Verdict for the defendants (*b*).

(*a*) That is founded on the statute vesting the lands in the churchwardens and overseers.

(*b*) Brandt obtained a rule nisi in Exchequer on the point as to service, but it was discharged, the Court thinking the case quite clear.

1860.

OXFORD CIRCUIT.

Gloucester, coram Byles, J.

REGINA *v.* MUNDAY.

Summer Assizes.

Prisoner not to be convicted of larceny if doubtful whether accessory before or after the fact.

THE prisoner, a woman, was indicted for larceny. The evidence left it doubtful whether she was an accessory before or after the fact.

BYLES, J., held, that although, if she were an accessory before the fact, she might be convicted on such an indictment, yet, if she were an accessory after the fact, she could not be so convicted, but must be indicted as such accessory after the fact. He told the jury that if they were in doubt as to whether she was or was not an accessory after the fact they should acquit her.

The prisoner was acquitted.

Coram Hill, J.

REGINA *v.* LANGLEY AND OTHERS.

Summer Assizes.

On an indictment for non-repair of a highway, the defendants pleading guilty, the Judge cannot adjudge costs to the prosecutor.

INDICTMENT for non-repair of a highway.

There had been a plea of not guilty at the last assizes.

The defendants were desired to retract the plea and plead guilty, which was done.

Pigott, Serjt. (with him *Powell*), on the part of the prosecutor, applied for costs under the Highway Act 5 & 6 Will. 4, c. 50, s. 95, the prosecution having been directed by the justices, and the statute providing that the costs of such proceedings should be directed by the Judge of Assize before whom the indictment was *tried*, to be paid out of the highway rate.

1860.

REGINA v. LANGLEY and Others.

Huddleston opposed the application, on the ground that the case had *not* been "tried." He cited a similar case at Hereford Spring Assizes, 1856, where the defendant had pleaded not guilty; and the same course was afterwards taken of pleading guilty; and PLATT, B., after consulting WILLIAMS, J., held that he could not direct the costs to be paid; *Regina* v. *Vouchurch* (*a*).

HILL, J., after consulting BYLES, J., concurred in this opinion, and decided accordingly, declining to direct the costs to be paid, and so

No order.

Subsequently, however, it appeared that only one of the defendants had pleaded guilty in person, the other had merely got the plea entered by the clerk of his attorney, whereupon

HILL, J., held that the case must be tried, as the plea had not been properly pleaded; but the case was arranged.

(*a*) 2 Carr. & K. 393.

1860.

HOME CIRCUIT.

Kingston, coram Wightman, J.

OXENHAM *v.* COLLINS.

Spring Assizes.

The owner of land involved in litigation in Chancery, held not liable for the acts of a person acting as her attorney in the Court, and of his own motion, under, as he supposed, its authority, but not being her general attorney, and without her privity or actual authority in the particular matter.

TRESPASS for entering plaintiff's house, taking his goods, &c.

Second count, upon an agreement by the plaintiff with the defendant, his landlady, that in consideration of her paying the costs and charges of a distress she had taken, she, the defendant, would not take any proceedings for the arrears of rent for six months from the date of the agreement. Averment of performance upon plaintiff's part.

Breach: that within the said period of six months the defendant distrained for the said arrears, &c. &c.

Pleas: 1. Not guilty.

2. Non assumpsit.

M. Chambers and *C. Wood* for the plaintiff.

Hawkins and *Garth* for the defendant.

Chambers, for the plaintiff, produced an agreement in writing to the effect declared on, and also a warrant of distress, signed by one W. Smith, as "attorney of Mrs. Collins," the defendant. To prove the authority he then called Smith, who admitted that he was her attorney in a suit in Chancery, but denied that he was privately, or generally, or in this particular matter; and declared that another person was her private attorney, and that he had never been authorized by her to sign the agreement or make the distress; but that he had acted always under the authority of the Court of Chancery, and that she was

not aware at the time of what he had done, nor did it appear that she had adopted it (*a*). Thereupon

WIGHTMAN, J.—If the attorney acted under the Court, and the defendant did not interfere, she is not liable. Therefore there must be a

Nonsuit.

(*a*) See, as to the first count, as to liability on the ground of *ratification*, *Wilson* v. *Tummon*, 6 M. & Gr. 236; 12 L. J., C. P. 207. As to the question of authority, see *Ewer* v. *Jones*, 9 Q. B. 623; 16 L J., Q. B. 42; where it was held, that the general agent of a minor, the receiver of her rents under the Court of Chancery, had authority to distrain. But here the question turned upon the authority to enter into an agreement, and no authority from the Court was proved.

Hertford, coram Blackburn, J.

WARD *v.* WILKINSON.

Summer Assizes.

In an action on a bill of exchange against the drawer and indorser, the only plea denying the indorsement, an application on the part of the defendant to postpone the trial on account of the absence of the acceptor, sworn to be a material witness, and to be absent in Scotland, was refused, it not appearing that any endeavour had been made to obtain his evidence under 17 & 18 Vict. c. 34, or otherwise.

ACTION on a bill of exchange for 230*l.*, drawn by defendant on and accepted by one G., and by defendant indorsed to the plaintiff.

Pleas (28 June): 1. Denying the indorsement.

2. That the bill was drawn and indorsed for the accommodation of the plaintiff without consideration.

The action was commenced in May, under the Bills of Exchange Act, and on the 7th June the defendant obtained leave to appear and defend, on an affidavit to the effect that he had been induced by the plaintiff to fill up a blank acceptance by G., by inserting his name as drawer, and then indorse it to the plaintiff, solely for his, the plaintiff's, accommodation, without consideration, the acceptor G. not being, according to this statement of the defence, at all privy to the transaction as between the defendant and the plaintiff.

On the 28th June the defendant delivered along with his pleas interrogatories pointing to the same defence upon an

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alleged account between the plaintiffs and defendant, and not to any facts of which the acceptor G. might be supposed to be cognizant.

The plaintiffs answered the interrogatories, denying the alleged arrangement between them and defendant, and asserting that the acceptor, through the defendant, had employed them to charter a ship; that it was necessary to pay a sum of money by way of advance; that the bill was transmitted through the defendant for the purpose, and that the plaintiffs only agreed to, and did, advance the money for the purpose, on the faith of defendant's indorsement. On the 10th July the defendant applied at Chambers before CHANNELL, B., to postpone the trial, on the ground of the absence of the acceptor G., who was sworn to be a material and necessary witness, and to be in Scotland (*a*), and could not attend the trial. It was not shown, however, that any endeavours had been made in the interval between the commencement of the action and the present time to obtain his evidence or to subpœna him, and the summons was discharged with costs.

The defendant withdrew his *second* plea, and now, the cause being called on, on the first day of the Assizes in the Crown Court (the criminal business being finished),

Honyman, for the defendant, applied to have the case put off, on the ground of the absence of G., the acceptor; but

(*a*) By the 17 & 18 Vict. c. 34, if in any action in England it shall appear to the Court or a Judge that it is proper to compel the personal attendance of any witness who may not be within the jurisdiction of the Court, it shall be lawful for the Court or Judge, if in its or his discretion it shall seem fit, to order that a writ of *subpœna* (*ad testificandum* or *duces tecum*) shall issue, commanding such witness to attend such trial, *wherever he shall be within the United Kingdom*, and the service of such writ *in any part of the United Kingdom* shall be as valid as if the same had been served within the jurisdiction of the Court from which it issues. If the witness is not in the United Kingdom, then there may be a commission to examine him under 1 & 2 Will. 4, c. 22.

BLACKBURN, J., refused the application (the facts appearing as above stated), and proceeded to try the cause; and upon the evidence, the case turning out to be as stated by the plaintiffs in their answers to interrogatories, there was a

Verdict for the plaintiffs.

Coram Cockburn, C. J.

EVANS *v.* WHITTINGSTALL AND ANOTHER.

Summer Assizes.

In an action of trespass by a tenant against his landlord, who justified under a clause in the lease allowing a notice to quit, which had been given, and the plaintiff had only *denied* it, and had not pleaded a *waiver* of it, but sought to set up such waiver in consequence of something that occurred during the trial:—*Held*, that the waiver could not be shown on the pleading as it stood, but should have been specially pleaded, and that the fact that it had not been so pleaded, and was not only set up as an afterthought in the course of the case, was strong to show that it had never taken place, but if it really *had*, leave would have been given to amend by pleading it, supposing it to have appeared the real question in controversy between the parties before the trial.

TRESPASS, for breaking and entering a house of the plaintiff's, and ejecting him therefrom, and keeping him expelled, and seizing his goods, &c., removing and breaking them to pieces, &c., by means of which the plaintiff was prevented from carrying on his trade and business of a beerseller, and prevented from selling his goodwill of the business for a premium, and his stock in trade and household furniture at a valuation, &c.

Pleas: 1. Not guilty.

2. As to the *house*, not possessed.

3. As to the goods, that the defendant Whittingstall was lawfully possessed of the house, and because the goods were wrongfully therein, he in his own right, and the other defendant as his servant, removed them to a small and convenient distance, and there left them for the plaintiff's use, doing no unnecessary damage thereto.

4. Leave and licence.

5. *Liberum tenementum* under Whittingstall, and justification thereunder.

6. Accord and satisfaction.

Replication: 1. Taking issue on the pleas.

2. (To the third plea.) New assigning, removal of the goods with more violence than on the occasion or for the

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purpose in the plea mentioned, and breaking and converting them, &c.

3. (To the fifth plea.) That on the 26th August, 1859, Whittingstall demised the house to the plaintiff for one year, by virtue whereof the plaintiff entered and was possessed until expelled by the defendant.

Rejoinder: 1. (To the new assignment.) Not guilty.

2. (To the third replication.) Joining issue.

3. (Also to the third replication.) Setting out the agreement of demise in writing, whereby it appeared that the house was a beerhouse, and it was agreed that the plaintiff should use it as such, and also use his best endeavours to promote the trade and custom thereof, and would not part with the possession or occupation of the premises, or assign over or part with this agreement to any person whomsoever. That either of the parties might leave on giving to the other one calendar month's notice in writing, which might expire on any of the usual quarter-days (on which the rent was made payable), and that upon the expiration of such notice so given or received, Evans agreed to deliver up possession of the premises to Whittingstall. It was further agreed that if Evans should refuse to sell beer upon the premises, or should shut up the house or discontinue to use the same as a public-house, or if breach or default should be made in any of the stipulations on his part, then in any or either of such cases, *or* upon the expiration of any such notice as might be given or received as aforesaid, it should be lawful for Whittingstall immediately thereupon to enter into the house and take possession thereof, and expel Evans, his family, &c., without being obliged to bring any action of ejectment, &c.

Averment, that such notice as in the agreement mentioned had been given by W. to the plaintiff and had expired; wherefore, and because plaintiff did not nor would after a reasonable time quit or yield up possession of the premises, but wholly refused so to do, and wrongfully with-

held possession thereof, the defendants did, as in the plea mentioned, quietly commit the trespasses, as they lawfully might, &c.

Surrejoinder, joining issue.

M. Chambers and *Kemp* for the plaintiff.

Hawkins, Joyce and *Finlason* for the defendants.

The agreement of the 20th August, 1859, was put in as part of the plaintiff's case, and it was proved that the plaintiff went in on a valuation of fixtures and furniture at 80*l.*

On the 24th November the defendant Whittingstall gave the plaintiff notice in writing to leave at Christmas.

The parties saw each other several times in the interval between the notice and its expiration about the substitution of another tenant. The defendant W. was willing and of course desirous to accept anyone he, the defendant, deemed eligible, and to allow the plaintiff to let such tenant in at a reasonable valuation, and two or three persons proposed, but one was not deemed eligible by the defendant, and the others could not agree with the plaintiff as to the valuation, the plaintiff demanding to be repaid the amount at which *he* had been valued in, the other parties desiring a new valuation of the furniture and fixtures. After the plaintiff had on this point disagreed with the last of the persons who had thus offered, the defendant W. wrote to him to the effect that, if he did not accept a tenant at a fair valuation, he should put him out according to the notice.

In the course of this evidence,

COCKBURN, C. J. (his attention not having been drawn to the surrejoinder), suggested that some of these conversations looked like a waiver of notice.

M. Chambers thereupon declared that he should rely upon them in that view; but

Hawkins pointed out that *waiver* should have been specially pleaded, whereas the plaintiff had simply *taken issue* on the notice, that is, had merely denied that the

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notice had been given, so that evidence of *waiver* would be inadmissible.

COCKBURN, C. J.—That is so, no doubt (*a*).

M. Chambers thereupon applied for leave to amend by surrejoining specially that the notice had been waived, as well as by denial of it; whereupon

Hawkins asked that in such case he might be allowed also to amend, by a rebutter that the waiver was conditional upon the plaintiff's accepting a new tenant on reasonable terms, and also by pleading another replication to the third plea, setting up a right of re-entry founded on a breach of one of the clauses in the agreement, viz., the one against assigning over or parting with the possession of the premises.

COCKBURN, C. J.—Any amendment which may appear necessary to secure a trial of the real matter in controversy between the parties shall be allowed on either side, when we see what the matter in controversy really is. If the plaintiff had intended to rely on waiver he would have pleaded it (*b*).

The case then proceeded.

On the 2nd January, 1860, the plaintiff left the house and took a new one, taking most of his furniture, and leaving a man behind to sell the beer remaining in stock.

On the 4th January the defendant's attorney wrote to the plaintiff to the effect that he expected the plaintiff to give up possession on the 10th, as it was the intention of the defendant then to take possession according to the agreement.

(*a*) *Horn* v. *Wingfield*, 3 M. & G. 33; *Carter* v. *Flower*, 16 M. & W. 743; 16 L. J., Ex. 199. *Aliter*, where the evidence is with a view to show that the notice, &c. has been given.

(*b*) And the C. L. P. Act, s. 222, only provides for amendment so as to cause that which was really in controversy between the parties before and at the time of the *action*, not mere after-thoughts occurring at the trial. *Wilkin* v. *Reed*, 15 C. B. 145. *Vide ante*, p. 164.

On the 10th January the plaintiff wrote to the defendant Whittingstall, intimating that he should not give up possession.

On the 11th January the co-defendant took out the remaining furniture, &c., some of which were taken away on the same evening by the plaintiff, and the rest were put under a shed for him and removed next day. The goods were sold by auction at a loss. It was suggested that they were removed carelessly and so damaged, but the evidence as to that was slight and contradicted.

COCKBURN, C. J. (to the jury).—The only question for you, if any (except as to damage), appears to be, whether the notice was waived. Beyond all doubt it was *given*. And the waiver was not originally suggested on the part of the plaintiff, who evidently had never intended to set it up, or he would have pleaded it, and it was suggested originally by me, at a time when I was not aware that the plaintiff had not pleaded it. Still there *might* be a waiver of a notice to quit, as there may be of a breach of covenant or any right of re-entry for non-repair or non-payment of rent. The plaintiff, by his own conduct, showed that he did not understand that it had been waived, for he went away and took another house. There might be a mutual understanding, for mutual convenience, without any intention of waiver. And if there was no *more* than that, the notice remained in full force, and if it was not waived the defendants are entitled to your verdict. If it *was* waived, then the plaintiff will be entitled to your verdict, and the question will be one of damages, as to which the defendants would be responsible for the negligence, though not for the wilful misconduct, of the men employed to remove the goods, and the plaintiff would be entitled to recover compensation for loss sustained through a forced sale.

Verdict for the defendants.

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PHILPOT *v.* STOCK.

Summer Assizes.

Where, in proof of an acceptance alleged to have been forged by the drawer, a letter purporting to have been signed by the defendant is put in as an *admission*, and as part of the plaintiff's case in chief, and its authorship was denied, it is left to the jury with the whole of the case. But a consent by the defendant to a judgment in an action on a former bill drawn by the same person was held inadmissible as irrelevant.

ACTION on a bill of exchange drawn by one Read on and accepted by the plaintiff, dated the 22nd November, 1859, for 50*l.*, payable three months after date; and also on another bill, dated 22nd February, 1860, drawn by Read upon and accepted by the defendant, for 60*l.*, three months after date.

Plea: that the defendant did not accept the bills or either of them.

Petersdorff, Serjt., and *Woollett*, for the plaintiff.

Hawkins and *Butler Rigby* for the defendant.

The defendant was a widow lady of some means, living at Shepherd's Bush, and the drawer was her son by a former husband. For the plaintiff one Miller was called, who swore that he had the first bill from the son, the drawer, bearing his mother's acceptance; that he went over to Shepherd's Bush to inquire if it was all right, and satisfied himself, but did not see her; and that he then discounted the bill, for which the other bill was afterwards given in renewal.

For the plaintiff there was also put in a letter purporting to be signed by the defendant, dated 26th April, 1860, addressed to the son (and stated to have been received by Waldron, the plaintiff's attorney, from the son), couched in these terms:—

"What is the meaning of inquiries being made so long after the date of the bill? You have always promised me that I should never hear of these transactions; yet I receive lawyer's letters which terrify me. If I receive any more such I shall go away, and you shall not know where I am. I beg of you to see Mr. Waldron at once."

The authorship of this letter being denied, evidence was given of it, part of the plaintiff's case, as an admission; and in support of the ordinary evidence of handwriting

other letters signed by the defendant were put into the witnesses' hands for the purpose of comparison of handwriting, being called for by the plaintiff for that purpose (*a*).

Petersdorff, Serjt., likewise proposed to put in the proceedings in a former action against the defendant on a bill drawn by Read, in which she had given a consent in writing (which was produced) for taking a judgment by default.

COCKBURN, C. J.—You have not stated how you propose to fix the defendant, whether by showing that the acceptance was her actual handwriting, or that she held out her son as having authority to accept in her name. That might be material, with a view to the admissibility of the evidence. But at present it should seem that in neither view is it admissible; for if your case is that the acceptance was her own writing, how does the fact that she admitted a former bill to have been so show that this was so? And if you put it thus:—that she *authorized* it, how does the fact that she admitted a former bill prove that she authorized the drawer to accept bills in her name, unless you show that the former bill was accepted by his hand? And even if you showed that, a *single* instance would be no evidence of a *general* authority (*b*).

Read, the drawer, was not called. The defendant was called, and denied the acceptances and the authorship of of the letter.

COCKBURN, C. J. (to the jury).—If the *letter* is genuine, the bills probably are so; if the *letter* is forged, *they* are probably so. If it was forged, it was forged in all proba-

(*a*) See *Cresswell* v. *Jackson*, *ante*, p. 24.

(*b*) See *Lewelleyn* v. *Winckworth*, 13 M. & W. 598. *Accord.* cited thus in Roscoe, p. 237: "An admission by defendant of his liability on another bill *accepted by the same agent* is confirmatory evidence, after proof of a general authority; but *semble* it would not be evidence *per se*."

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bility by the drawer, and would go far to prove that he forged the bills (*a*). It is for you to decide whether the letter was genuine or not, just as it is for you to determine whether the bills are so. Were they accepted by or with the authority of the defendant?

Verdict for the defendant.

(*a*) Where a letter is put in merely for the purpose of contradiction, and its genuineness is disputed, it raises a collateral issue for the judge. See *Cooper* v. *Dawson*, 1 F. & F. 550. But here the letter was put in as an admission as part of the plaintiff's case in chief.

MOXON *v.* SAVAGE.

Summer Assizes.

In trespass, a plea of leave and licence means, leave and licence in *fact*, and a licence in *law* must be specially pleaded; and *semble*, it may be pleaded to part of a count, if severable and distinct.

On a count for entering a house and taking *fixtures*, &c., *semble*, that in the plea of not possessed, the verdict may be entered distributively, as on a count for entering a house and taking goods; but it appearing that the removal was after the determination of the tenancy. *Held*, that plaintiff was entitled to the verdict.

TRESPASS for breaking and entering a house of the plaintiff and taking away rafters, timbers, sleepers and fixtures, and damaging the walls.

Second count, in trover, for taking timbers, fixtures and rafters, &c.

Third count, for use and occupation.

Pleas: 1. Not guilty.

2. Not possessed.

3. Leave and licence.

4. Never indebted, &c.

Hawkins and *Biron* for the plaintiff.

Finlason for the defendant.

It appeared that the building was originally a barn, with earth floor, no ceiling and bare walls and roof, and that more than twenty years ago the defendant, then being tenant of a house to which it pertained, fitted up the barn as a chapel, with the consent of his landlord; and on the understanding that the fittings should belong to the congregation, and *which* he deemed to be fixtures. In 1858 the plaintiff had bought the house and barn at an auction, with notice of all this, and with an *express* reservation of the "fittings" in the barn; to prove which the particulars of sale were produced by the auctioneer,

but the deed of conveyance was not produced. The plaintiff had given notice to the defendant to leave, and his tenancy had thus been duly terminated, and he had given up possession. But finding that the plaintiff intended to remove and appropriate the fittings of the barn (which had ceased to be used as a chapel), the defendant got the key, entered and removed the fittings, without, as it appeared, doing any damage to the *walls*. The plaintiff had not complained of this until nearly a month afterwards, when the defendant disputed his claim to 5*l*., the balance due for rent, when this action was brought and the claim for the trespass included in it.

Finlason, for the defendant, contended that there was evidence of a licence either in law or in fact.

COCKBURN, C. J.—There is only a plea of leave and licence, which means a licence in *fact*, and *before* the trespass.

Finlason contended that the subsequent acquiescence might be evidence of a precedent licence.

COCKBURN, C. J.—Hardly so here.

Finlason submitted that there was a licence in law.

COCKBURN, C. J.—It is not pleaded, and scarcely could be (*a*).

Finlason then claimed the verdict on the plea of not possessed to the second count in trover, a *distributive* verdict on the same plea as to the count in trespass, so far as regarded all but the entry (*b*).

(*a*) The plea must have shown the *cause* or *ground* of the licence, that the Court might judge of it, being matter of *law* (*Anthony* v. *Haney*, 8 Bing. 186); and though such a plea had been framed, it was found impossible to draw it so as to avoid legal difficulty, which (even if it otherwise could have been added to the record by amendment) would have prevented its being so added, as it would have entitled the plaintiff to demur, so it was not deemed worth while to attempt it. The great difficulty was as to the *conveyance*, which probably gave the plaintiff a legal title.

(*b*) It was held long before the Common Law Procedure Act that in trespass for entering plaintiff's

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Hawkins pointed out that the entry and removal of the fixtures was *after* the determination of the tenancy.

COCKBURN, C. J.—Undoubtedly it appears that the fittings are not the plaintiff's; but they could not be taken away after the tenancy had been determined, and the entry cannot be justified, and as to that the plaintiff must have a verdict, as well as on the count for use and occupation. It is hardly worth disputing about the verdict for the defendant, as *he* cannot have the costs of the cause or trial (*a*); and as to the plaintiff, he cannot have more than nominal damages, and I shall not certify for costs.

Finlason thereupon consented to a

Verdict for the plaintiff on the first counts for 1*s.* damages, and on the last count for 5*l.*

house and taking his goods—plea, not possessed, it appearing that the house and part of the goods belonged to the plaintiff, the rest to the defendant—that the issues were divisible, and that the verdict should be entered accordingly, part for the plaintiff and part for the defendant; *Routledge* v. *Abbott*, 8 A. & E. 592; 7 L. J., Q. B. 221. And so upon not possessed in trover, the plaintiff might have the verdict as to some of the articles, the defendant as to the rest; *Williams* v. *Great Western Railway Company*, 8 M. & W. 856. There was often a difficulty as to pleas of justification, on account of their confessing more than they avoided, though, if severable, were so construed (*Vivian* v. *Jenkins*, 3 A. & E. 741), but if entire, then, failing in part, they failed altogether; *Foulds* v. *Scarfe*, 4 Sc. N. R. 713; *Clark* v. *Taylor*, 2 B., N. C. 654. The C. L. P. Act, s. 75, only applies where pleadings are *capable* of being construed distributively. *Vide Cory* v. *Bond*, *post*.

(*a*) The C. L. P. Act, 1852, s. 81, is, that the costs of any issue shall follow the finding on such issue, and be adjudged to the successful party, whatever may be the result of the other issues (Finlason's C L. P. Acts, p. 182); and on the general issue to several counts the defendant has costs on the counts as to which the plaintiff has failed (*Cox* v. *Thomson*, 2 C. J. 498), deducted from the general costs of the cause if they go to the plaintiff (*Knight* v. *Brown*, 9 Bing. 643), and so even as to the general issue to the same counts (*Prudhomme* v. *Fraser*, 2 A. & E. 645). But where the general issue is found for the plaintiff, and a traverse going to the whole found for him as to part, the defendant is not entitled to costs on that issue; *Anderson* v. *Chapman*, 5 M. & W. 483. The costs of the count in trover would have been merely nominal.

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Chelmsford, coram Blackburn, J.

TURNER *v.* HUTCHINSON.

Summer Assizes.

A farm bailiff or agent who was used to let farms upon the ordinary terms, and received the rents, &c., *held* to have no authority in law to let upon unusual terms, unknown to the owner; and the question was left to the jury as one of fact, whether he had express authority, or had been held out by the defendant as having it.

FIRST count: that the plaintiff became and was tenant to the defendant of a house and farm, on the terms, *inter alia*, that the said house, &c. being much out of repair, the plaintiff should not be bound to repair them or leave them in good repair at the end of his tenancy; but that, if he should do any repairs, or make any improvements on the farm and premises, and receive notice from the defendant or his agent to quit, he should be paid and allowed a full and fair compensation for such repairs and improvements.

Averment, that afterwards, and during the said tenancy, he did divers repairs to the said buildings, and made divers improvements in the said farm and premises, and in so doing expended divers monies, and that afterwards he received notice from the defendant to quit, and in pursuance thereof did quit the said farm, and that a full and fair compensation for the said repairs and improvements amounted to about 205*l.* 11*s.* 6*d.*

General averment: breach, nonpayment of that sum.

Second count: that on the 25th May, 1854, an agreement in writing was made and entered into between the plaintiff and defendant, which was set out *in hæc verba*, and appeared to have been entered into on the part of the defendant by one Shaw, and said to have been "his agent authorized in that behalf." It recited the original agreement of September 27, 1850, which contained a clause to the effect above stated as to repairs and improvements, with this addition: "That at the end of the tenancy the said Turner should be entitled to be paid a valuation for the tenant's property in the farm and premises in accordance with the terms of the valuation he should be subject to on entry." And then it went on to state that the said

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recited agreement of September 27th, 1850, not having been duly stamped, and Turner having expended a considerable sum of money in repairs and other improvements, and having also received notice to quit on the 29th September next (*i. e.* 1859), it had been deemed advisable to enter into this agreement in order legally to secure to Turner payment of such compensation and valuation as it was intended he should be entitled to. And then it was witnessed that, "it was agreed that Shaw, acting as the agent of Hutchinson, did thereby agree with Turner that he was to allow to Turner a full and fair compensation for his repairs and improvements on the farm and premises during his said tenancy, and also the amount of the valuation of the tenant's property, in accordance with the terms of the valuation which Turner had paid on entering, the amount of such valuation to be settled by valuers to be chosen by each party respectively, and the amount to be paid to Turner before he was required to give up possession."

Averment, that the facts recited in the agreement were true; that after the tenancy ceased the plaintiff chose one J., as valuer, to settle with a valuer for the defendant the amount of such compensation and valuation, and that plaintiff's valuer was ready to do so.

General averment: breach, that the defendant would not appoint a valuer.

Common counts, for work done and money paid.

Pleas: 1. (To the first count.) That plaintiff did not become tenant to the defendant on the terms stated.

2. That the plaintiff did not do the repairs or improvements.

3. (To the second count.) That the first-mentioned agreement of 27th September, 1850, was not made or entered into by and between the plaintiff and defendant; nor did defendant enter into it.

4. That the defendant did not, by the said first-men-

tioned agreement, agree to let, nor did the plaintiff take the farm, &c., on the terms therein set forth.

5. That the plaintiff did not expend the said money on the said repairs or improvements as alleged.

6. That the defendant did not have notice that plaintiff's valuer had been chosen to settle the said valuation and compensation as alleged.

7. (To the rest of the declaration.) Never indebted.

8. Payment. Issues joined.

Hawkins and *Garth* for the plaintiff.

Lush and *L. Kelly* for the defendant.

The plaintiff was called, and proved that he entered into the farm in September, 1850, on an agreement with Shaw on the part of the defendant, which was in writing, and to the effect stated in the second count, and which was produced, and appeared not to have been stamped. He paid the amount of the valuation to the outgoing tenant in the usual way. He had done repairs to the farm buildings and made substantial improvements in the way of constructing roads, erecting walls, roofing out-houses, &c., consulting Shaw as to all of them.

In December, 1858, he received notice to quit.

He saw Shaw, who consented to enter into a second agreement embodying the first, and the agreement set forth in the second count was accordingly drawn up and signed by Shaw on the part of the defendant.

It appeared that Shaw was a kind of farm bailiff, who allotted timber to the tenants for repairs, sold the produce of the farm and let tenants in, on the ordinary terms of tenancies from year to year, and also received the rents.

The valuation had been made and drawn out, and was produced, not stamped; it set forth the amount due to be 205*l.*, as stated in the first count.

The *defendant* had not appointed any valuer, nor had he been made aware of the agreement entered into by Shaw.

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He was called, and denied that he had ever heard of any other than the ordinary terms. Shaw had since died.

BLACKBURN, J. (to the jury).—Was there any authority in fact from the defendant to Shaw to enter into such an agreement as the plaintiff sets up? or did the defendant hold out Shaw, or allow him to act and appear as if he had such authority? If so, find for the plaintiff; but if not, and if you believe Shaw had only authority to let in tenants on the ordinary terms, find for the defendant.

Verdict for the defendant.

DICKENSON AND ANOTHER v. LANO.

Summer Assizes.

The defendant, manager of a stone quarry, signed a shipping note, expressing that stone was shipped on board the plaintiff's vessel to be carried for the owner of the quarry, who however never appeared. In reality it was shipped for the purchaser of the stone, the real consignee. In an action for freight and demurrage, evidence of usage that in such cases the quarry owner never paid freight, &c. was admitted, and the question, whether the stone was shipped for the defendant, was left to the jury upon all the circumstances.

ACTION for freight and demurrage.

Declaration, that in consideration that the plaintiffs at the request of the defendant would receive on board their vessel a quantity of stone, to be carried in their vessel from Portland to London, for reward to them, the defendant promised them to receive the stone from out of the vessel within a reasonable time after its arrival at London.

Averment, that the plaintiffs received the stone on those terms and carried it to London, where it was ready to be discharged within a reasonable time, whereof the defendant had notice, and took a part of it away.

Breach, that he did not within a reasonable time take the residue of it away, but neglected so to do, whereby the plaintiffs lost the use of their vessel a long time and were put to charges, &c.

Second count, for money payable for freight and for the conveyance of goods, and also for demurrage of a ship of the plaintiffs kept and detained by the defendant on demurrage, &c.

Pleas: 1. That the defendant did not agree as alleged.

2. That the plaintiffs were not ready to deliver the stone within a reasonable time, according to the contract.

3. That the plaintiffs prevented the defendant from taking away the residue of the stone according to the contract.

4. That the plaintiffs, before any breach, exonerated the defendant.

5. (To the third count.) That he did not detain the vessel.

6. (To the second and third counts.) Never indebted.

Parry, Serjt., and *Barnard* for the plaintiffs.

Hawkins and *Maud* for the defendant.

It was opened for the plaintiffs that one Williamson was the agent of the defendant, and had first delayed the unloading and then had disappeared.

The case for the plaintiffs being closed,

Hawkins opened for the defendant, that he was not the owner of the stone, but the foreman or manager of one Weston, the owner of the quarry; that Williamson had bought the stone and that the defendant as *his agent* had engaged the plaintiffs' vessel to carry it.

The shipping note given by the defendant was as follows:—

"Shipped on board the M——, 31 blocks containing 88 tons, for Mr. G. Weston, of Dalston, London Hermitage Wharf, Wapping; freight 7*s*. per ton. (Signed) J. LANO."

A letter from Williamson to the defendant directing him to get freight at the lowest rate was put in evidence.

The defendant stated that it was usual for the quarry-masters to give such notes on the shipment of stone, but that they had nothing to do with the stone after shipment.

Hawkins asked if there was any usage in the business as to the payment of freight in such cases.

Parry, Serjt., objected that the evidence of usage was inadmissible to control the contract, and that even if it

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were admissible, the witness was not a proper person to give it, being only a stone merchant, not acquainted with the customs of shipping.

BLACKBURN, J.—There is no *contract* in writing (*a*), and the usage is not as between consignor and consignee, but as between shipper and shipowner. I think, therefore, that the evidence is admissible.

The defendant then stated that he never paid freight in such cases in his life, nor had he ever known the other quarry-masters do so—that the consignee always paid it.

Parry, Serjt.—That begs the question, whether the shipper is liable; or the custom is bad, being a custom that shippers shall not pay their debts. Besides, a custom that the consignees pay does not show that the shippers are not liable to pay.

BLACKBURN, J. (to the jury).—The question is, whether the defendant is liable. That depends upon whether the plaintiffs took the stone on board to be carried for the defendant or for Williamson. If for the defendant, then he is liable; if for Williamson, the real consignee, then the defendant is not liable, and the plaintiffs' remedy is against *Williamson*.

Primâ facie the contract is with the owner of the *goods*, as in the ordinary case of goods delivered on behalf of a vendee to a carrier, at the vendee's risk. The custom here set up is in truth nothing more than this—that what is the general law prevails in the stone trade. But if the carrier made a bargain with any one else, as the party who bought the goods, clearly that bargain would bind. So here the question is, whether there was such a bargain

(*a*) Where there is, as here, not a *contract* in writing, but a mere memorandum, part of a transaction, the question of liability is for the jury on all the circumstances, as in the converse case of liability of *consignee* on receipt of the goods; *Wegner* v. *Smith*, 15 C. B. 285; 24 L J., C. P. 28; *Smith* v. *Seiveking*, 4 E. & B. 945; 24 L. J., Q. B. 257.

between the plaintiffs and the defendant, that is, an agreement with the defendant at the time of shipment, to carry the stone for *him*. There is no *contract* in writing, the written memorandum put in evidence is not clear as to the parties to the contract. It may be, either that the defendant made the contract for Williamson or made it for *himself* at Williamson's request. The master of the ship has a lien for freight, but not for demurrage, so that as to the latter, he would be likely to enter into some express contract.

Verdict for the plaintiffs.

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TRESPASS for entering the plaintiff's land.

Pleas: 1. Not guilty.

2. Not possessed.

3. Justification under a right of way granted by the plaintiff to one Cuddon, the owner of close C., afterwards conveyed by Cuddon to the defendant.

4. Justification under rights of way attached to close C., reserved by Cuddon to the right of way by necessity.

5. For a defence on equitable grounds, that Cuddon being seised of C. put it up for sale along with other closes A., B., D., &c. on certain conditions, *inter alia*, that they should be sold, subject to all ways and rights of way then used and enjoyed over the same respectively. That the plaintiff agreed with Cuddon to purchase lot A. (the *locus in quo*), and the defendant agreed with Cuddon to purchase lot C. That afterwards Cuddon, in consideration of the purchase-money paid by the defendant on the faith of the said conditions, by deed conveyed lot C. to the defendant with all ways and rights thereto appertaining. That the tenants and occupiers of C. had used and enjoyed

In an action of trespass, the question being as to a right of way over the *locus in quo* as an equitable plea, stating that the defendant had contracted to purchase from one C. a close, to which was attached the right of way in question, and that the plaintiff had contracted with C. to purchase the *locus in quo* subject to such right, but that by their mutual mistake it had been omitted in the conveyance; evidence admitted on the part of the plaintiff as to what C. said at the sale as to the close conveyed to defendant, in order to negative the alleged agreement with him.

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a certain way over the *locus in quo*, which was and is necessary to its convenient enjoyment: that at the time of the agreement with defendant, the existence of the way was notorious and *apparent* (*a*), and that the plaintiff knew it, or had he made reasonable inquiries would have known of it: that after the agreement with defendant, but before the conveyance to him, Cuddon conveyed lot A., the *locus in quo* to the plaintiff, by a deed which purported and was intended by the *plaintiff and Cuddon* to be made in conformity with the plaintiff's agreement, but by accidental error and mistake was not made subject to ways as aforesaid as it ought to have been, &c. Issue.

Lush and *G. Denman* for the plaintiff.

Bovill and *L. Kelly* for the defendant.

The *locus in quo* and all the adjoining land belonged in 1858 to one Hurrell, who had possessed it for some years previously; and while he was the owner the only way used from the land, now the defendant's, to the road was the way in question, over the *locus in quo*, and that any other access was almost impracticable.

In 1858 one Cuddon purchased the whole of the land.

In September, 1858, Cuddon sold the land in various lots to different persons, and the plaintiff bought the *locus in quo*.

In October the defendant bought lot C., the land to which, as was alleged, the way in question had been used.

Afterwards the conveyance to the *plaintiff* was executed *prior* in date to that of the defendant, and it contained the usual terms, "all *ways*, paths, &c. thereunto belonging or appertaining," &c., without any *express* exception or reservation of the way in question. The conveyance to the defendant contained similar terms as regarded the land conveyed to him. The conditions of sale contained no terms such as were stated in the equitable plea.

(*a*) See *Glave* v. *Harding*, 27 L. J., Exch. 286.

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It was agreed that the only question of fact was as to what passed at the sale. Evidence was given for the defendant that C. had stated that he had so arranged the lots as far as possible, as that they should all be accessible to the road.

Denman called the plaintiff to show what was stated by Cuddon at the sale, and he said that Cuddon said as to lot C., that he was unable to do so, and that therefore it was arranged according to the conditions of sale.

Bovill objected to this; but

Denman.—It arises on the equitable plea; and

BLACKBURN, J., on that plea admitted the evidence that it did not appear that he had so stated as to the lot purchased by the defendant. And on that question,

Verdict for the plaintiff.

WRIGHT *v.* BUNYARD.

Summer Assizes.

In an action upon a contract, in which the consideration was a bill of exchange given by the plaintiff to the defendant, who had notice to produce it, but as the *voir dire* stated that before the notice he had discounted it with his banker. *Held*, that it must be proved either by production or secondary evidence under the notice to produce; but, *quære*, whether such secondary evidence was admissible; *semble*, that it was not, and that the plaintiff's course was to have had a discovery of its custody, and served the banker with a *subpœna duces tecum*.

DECLARATION, that there had been recovered against the plaintiff certain judgments, and that in consideration that the plaintiff would accept a bill of exchange to be drawn on him by the defendant, for the amount of the judgments, the defendant undertook to protect the plaintiff from the said judgments.

Averment, that he did accept the bill.

Breach, that the defendant had not protected him from the judgment, but allowed him to be arrested thereon.

Pleas: 1. That he did not undertake as alleged.

2. That the plaintiff did not accept the bill as alleged.

Hawkins and *Turner* for the plaintiff.

Parry, Serjt., and *Laxton* for the defendant

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Certified copies of two judgments against the plaintiff, dated in March, were put in, and the plaintiff stated that in April he had seen the defendant, who asked him "what he meant to do about these matters," and that he offered his acceptance, which the defendant received, not to discount but to return former bills.

Hawkins then called for the bill, upon notice to produce it.

Parry, Serjt., offered to adduce evidence that the defendant had it not, and had passed it away almost immediately.

BLACKBURN, J.—I doubt whether that will suffice to exclude secondary evidence of the bill; however, it may excuse you from producing it.

Parry, Serjt., called the defendant upon the *voir dire* (*a*), and he stated that the plaintiff had given him a blank acceptance; and that on the 2nd May he had got it discounted at his bankers, who had had it ever since.

Hawkins cross-examined the witness on the *voir dire*, and elicited that all bills went to Masterman's in London, and came back from them. The notice to produce was on the 12th July (the trial being on the 18th), and that he had told his attorney he could not obtain the bill.

BLACKBURN, J.—I doubt if there is sufficient to admit secondary evidence of the bill (*b*).

(*a*) The question whether there is sufficient proof of possession on the opposite party is solely for the Judge; *Harney* v. *Mitchell*, 2 M. & Rob. 366; *S. P.*, *Boyle* v. *Wiseman*, 24 L. J , Exch. 160.

(*b*) When a document is in the hands of a person who holds it as stakeholder between the defendant and a third party, the notice to produce is not sufficient to let in secondary evidence (*Parry* v. *May*, 1 M & Rob. 279); for though it need not be shown that the document is in the actual possession of the party, it must be in the hands of some one *who is bound to give up possession to him*; *Ibid.*; Roscoe on Evidence, p. 8. Where the instrument has been delivered to a third party, between whom and the party to the suit there exists a privity,

Hawkins.—We have done all that we could to obtain it.

BLACKBURN, J.—I am not quite sure that you have.

If the banker had been served with a *subpœna duces tecum* he would have produced the bill.

Hawkins.—We could not know what had become of it.

BLACKBURN, J.—That does not give you a right which otherwise you would not have. Besides, you might have applied for production of documents under sect. 50 of the Common Law Procedure Act, 1854 (*a*), or for leave to exhibit interrogatories (*b*).

notice to the latter is sufficient; *Baldney* v. *Rechie*, 1 Stark. 338. So notice to a defendant to produce a cheque drawn by him and paid by his banker is sufficient to entitle the plaintiff to give secondary evidence of its contents, although the cheque remains in the banker's hands; *Partridge* v. *Coates*, R. & M. 156. If the instrument was in the defendant's possession at the *time of notice*, it will suffice, but if he has *assigned* it away, as in the case of a lease, *before* notice, secondary evidence will be inadmissible; *Knight* v. *Martin*, Gow, 103. [In this case it did not appear that the bill was indorsed, but probably it was in blank.] But notice to defendant's attorney to produce a document which he has once parted with, but which in the course of business he ought to have had back, is sufficient; *Taplin* v. *Atty*, 3 Bing. 164.

(*a*) Upon the application of either party, upon an affidavit of his *belief* that *any* document, to the production of which he is entitled, for the purpose of *discovery or otherwise*, is in the *possession or power* of the opposite party, it shall be lawful, &c. to order that the party, &c. shall answer on affidavit, stating what documents he has *in his possession or power* relating to the matters in dispute, *or what he knows as to the custody* they or any of them are in, &c. Those words "possession or power" appear to indicate the scope of the *notice to produce*. The *subsequent* part of the clause supplements or aids the common law powers as to notice to produce, by affording information on which the applicant may serve with *subpœna duces tecum* any person in whose custody any document may happen to be, material to his case.

(*b*) Sect. 51, "interrogatories in writing as to any matter as to which discovery may be sought." If the applicant cannot make the affidavit of belief under sect. 50, he can apply under this clause.

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Hawkins.—Those new powers cannot affect the rule of practice as it stands at common law. This document was in the control of the defendant, he might have got it from his banker.

Parry, Serjt.—Not unless he paid it, which he was not bound to do.

BLACKBURN, J.—The point is so doubtful that, though I will admit the document, the plaintiff must take it at his peril (*a*).

Hawkins then tried to make out his case without the bill; but

BLACKBURN, J., ruled that he could not in its absence get out more than the fact, whether a bill stamp was procured, and could not go at all into its contents, whether parties or amount, unless he gave secondary evidence under the notice.

At the close of the case,

Parry, Serjt., applied for a nonsuit, there having been no evidence of the bill, and

BLACKBURN, J., ruled that there was no case without it; thereupon

Hawkins gave secondary evidence under the notice to produce.

Verdict for the plaintiff, damages 40*s*.

(*a*) See *Whitford* v. *Tutin*, 10 Bing. 395, and *Rutter* v. *Chapman*, 8 M. & W. 388. And see Finlason's C. L. P. Acts, ed. 1860, p. 110. And the case of *Irwin* v. *Lever*, *post*.

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CORNFORTH *v.* THE DANUBE AND BLACK SEA RAILWAY COMPANY.

Summer Assizes.

An agreement by the master of a ship to take out a machine to a foreign port, he working on board. *Held*, within the exemption in the Stamp Act as to the "hire of any labourer."

FIRST count upon an agreement, by which the plaintiff was to take out a dredging machine to a port in the Black Sea, and be paid 50*l.*

Second count, for work, &c.

Pleas: denying the contract in the first count, and the breach; and never indebted.

Prentice for the plaintiff.

Hawkins for the defendant.

The plaintiff was examined as to a written agreement, which he said he had lost.

Hawkins put into his hands a written agreement, which it was admitted was a duplicate original, but it was unstamped; and the plaintiff said that the other duplicate had not been stamped.

It appeared that the plaintiff had actually worked on board the vessel which carried out the dredging machine.

Prentice cited *Wilson* v. *Zuleta* (*a*), to show that the agreement was within the exemption of the Stamp Act, as an agreement for the hire of a "labourer or artificer;" and

BLACKBURN, J.—The matter being doubtful, I shall not exclude the document.

Verdict for the plaintiff.

(*a*) 14 Q. B. Rep. 405. That was the case of a fireman and stoker on board a steamer.

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Lewes, coram Blackburn, J.

NORTH *v.* JACKSON.

Sussex Summer Assizes.

A bonâ fide purchaser of a horse from a person who had bought it, (as the second purchaser knew), at a fair, without any evidence that he knew it was obtained dishonestly although it had been purchased on credit, and not paid for, *Held*, entitled to maintain trover against the original owner for retaking it.

Quære, whether he would not have been equally entitled even had it been proved that the buyer at the fair never meant to pay for it, but to defraud the owner of it.

TROVER for a horse.

Pleas: not guilty, and not possessed.

The plaintiff, a farmer at Henfield, near Wokingham, proved that about the 23rd or 24th May he bought the horse of one Lannaway for 38*l.* (which he paid), and that a few days afterwards the defendant came and took away the horse.

Lannaway was called for the plaintiff, and proved that he bought the horse of one Border, at Farnham, *and understood that it had come from Wickham fair.*

The defendant, a farmer near Farnham, proved that on the 20th May he sent his servant, one Smith, with the horse to Wickham fair, telling him to sell it for 33*l.*, and not to part with it without the money.

Smith was called, and proved that he took the horse to the fair, and that there one Border, whom he did not know, offered to buy the horse for 31*l.* 10*s.*, to which, at the suggestion of another man unknown, but who was called Hobbs, the witness assented; it being also agreed that the horse should be returned or paid for in three days; and Border gave him a written memorandum of the sale, with a warranty of soundness, and paid him a sovereign as earnest to bind the bargain. On showing the paper to a friend at the fair, the witness was warned that it was most likely a fraud, and he had recourse to the police, who, however, declined to interfere until the three days had elapsed.

It did not appear whether the formalities required by statute with reference to the sale of horses had been observed (*a*).

(*a*) Even if it had so appeared, there was no evidence that the second purchaser knew of it, or knew that the horse had been

When the three days had elapsed, nothing having been heard of Border, a warant was obtained, but he could not be found; and the defendant finding the horse at the plaintiff's had reclaimed it as stolen.

Lush, for the defendant, submitted that the plaintiff could not maintain the action, as the servant had no authority to sell on credit, and no property passed by the pretended purchase, which was evidently a mere trick, with no intention to pay for the horse.

BLACKBURN, J. (to the jury).—Do you know of any custom or usage that a farm servant at a fair should sell a horse on credit?

The jury said that it was the usage for a servant to do the best he could for his master; even to sell on credit.

BLACKBURN, J., thereupon, reserving leave to move on behalf of the defendant, directed (*a*)

Verdict for the plaintiff (*b*).

bought on credit, or had not been paid for; and *semble* that the scope of the statutes is to prevent fraudulent sales, not purchases. They have nothing to do with the buyers, but the *sellers*. It is the *sellers* who are to make a note, &c. The object is to prevent thieves from *re-selling* horses at a fair. Thus the statutes would have applied, if Border had resold at the fair to Lannaway, supposing that Border might have been proved to be a thief. And, even then, the statutes would not have applied as to the plaintiff, a *bonâ fide* buyer.

(*a*) This was a finding upon a matter of fact without any evidence, in accordance with ancient practice, making the jury judges of matters of fact of a public nature within their own general knowledge, as usages of trade, customs of the country and the like. *Aliter* of particular or private matters of fact, of which only one of the jury may be cognizant, as to which he must be sworn and examined as a witness. The finding of this usage, however, was unnecessary, the sale having been in market overt, which would of course have disposed of the question if the purchase had been *bonâ fide* (*Horwood* v. *Smith*, 2 T. R 750); and the learned Judge seems to have assumed that it was so, there being no evidence adduced to show that it was not, for the mere fact of Border's not being found, and not coming forward, might not, *per se*, be sufficient, since he might have died, or gone abroad, &c.

(*b*) *Lush* obtained a rule *nisi* in

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Q. B, on the grounds that the question asked of the jury was irrelevant, and that the verdict was against the evidence; that the question should have been asked whether Border got possession of the horse intending not to pay for it, but to steal it, or defraud the owner of it; and that, on the facts, the plaintiff had no title. The rule, however, was never argued, and it should seem for the reason above stated, that it could not have been supported. There is no doubt that a sale, not in market overt, or even in market overt, as against the buyer *himself*, or a pretended purchase with intention *not* to pay, passes no property; *Noble* v. *Adams*, 7 Taunt. 59. But it is otherwise of a sale *in* market overt as against *bonâ fide* purchasers from the buyer, with notice that the original sale was in market overt. Here Lannaway swore he understood Border had bought *at the fair*, and even if there was evidence that Border's purchase was a pretence, there was none as to *Lannaway's*, nor was there any evidence that he knew that the statutable requisites had not been observed, nor indeed any evidence that they had *not*, and, in the absence of such evidence, perhaps it must be assumed that they *had*.

Coram Cockburn, C. J.

MOWERS *v.* CHATFIELD.

Summer Assizes.

The judge may certify for costs in an action of slander.

SLANDER on a trader; laying special damages.

Plea: the general issue.

Ribton and *Willoughby* for the plaintiff.

Parry, Serjt., and *Gates*, for the defendant.

Verdict for the plaintiff.

Willoughby, for the plaintiff, applied to the Judge to certify for costs.

Gates, for the defendant, submitted that there was no right to certify in slander, as the statute of James (*a*) did not give it, and the statute of 3 & 4 Victoria (*b*) not extend-

(*a*) 21 Jac. 1, c. 16, s. 6, in all actions upon the case for slanderous *words*, if the jury do find or assess the damages under 40*s*., the plaintiff shall recover only so much costs as the damages so given amount to, without any further increase, any statute notwithstanding. This does not extend to *libel*; Tidd's Pract., vol. 2, p. 462.

(*b*) 3 & 4 Vict. c. 24, not repealing the statute of James 1, and enacting: "If the plaintiff in any action of trespass, or trespass on the

ing to actions on the case for slander, nor repealing the former act.

COCKBURN, C. J., considered that he had power to certify, and certified accordingly.

case, shall recover by the verdict of a jury less damages than 40s., such plaintiff shall not be entitled to recover from the defendant in respect of such verdict any costs whatever, unless the Judge shall immediately afterwards certify on the back of the record that the action was really brought to try a right, *or* that the trespass or grievance in respect of which the action was brought was wilful or malicious." Under this it has been held that libel (which is not included in the statute of James 1, *vide supra*) is included. *Foster* v. *Pointer*, 8 M. & W. 395. But if the Judge certifies, the case is under the statute of James, *Evans* v. *Rees*, 30 L. J., C. P. 16.

REGINA *v.* BULL.

Summer Assizes.

A medical man who administered to his mother, for some disease, prussic acid, of which she almost immediately died; *Held*, not guilty of manslaughter, it not appearing distinctly what the quantity was which he administered, or what quantity would be too great to be administered with safety to life.

THE prisoner was indicted for the manslaughter of his mother.

Barrow for the prosecution.

Ballantine, Serjt., and *Griffiths* for the prisoner.

The prisoner, a medical man, lived with his mother, and she being ill, he got a drachm of prussic acid, which filled one-fourth of an ounce bottle. After she came in from a walk he gave her some of the prussic acid; she went up stairs, and, while taking off her bonnet, died. The prisoner said he had given her four drops, but it appeared that the bottle had lost much more. The cork, however, was broken, and the bottle was loose in his pocket.

The medical men called for the prosecution gave very obscure and confused evidence as to the relative strengths of different preparations of prussic acid, as to the mode of measuring "drops," as to the quantities contained in "drops," and as to the quantity likely to kill. But it appeared that the cork being held partly in would very much affect the quantity of a drop, and that the state of a

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person's body might vary the effect of a few drops of the poison.

COCKBURN, C. J. (to the jury).—The prisoner is indicted for manslaughter, on the ground of his having administered a deadly drug with culpable negligence. If a person takes upon himself to administer a dangerous medicine, it is his duty to administer it with proper care; and if he does it with negligence he is guilty of manslaughter.

But do the facts here show such culpable negligence on the part of the prisoner?

If, indeed, the prisoner had given the deceased all that was missed from the bottle, it would be so, for the quantity would have been so large that it must have been the grossest negligence. But the cork was found broken and half out of the bottle, so that it is impossible to say how much of the poison might not have escaped; or again, the cork being half gone, the liquid might have dropped faster than the prisoner supposed, and, if so, it would not be such culpable negligence as would make him criminally responsible. If you think there was not such negligence, acquit the prisoner.

Verdict, not guilty.

REGINA *v.* HOPLEY.

Summer Assizes.

A schoolmaster, who, on the second day after a boy's return to school, wrote to the parent proposing to beat him severely to subdue his alleged obstinacy, and on receiving the father's reply, assenting, beat the boy for two hours and a half secretly, in the night, and with a thick stick, until he died: *Held*, liable to a charge of manslaughter.

THE prisoner was indicted for the manslaughter of Reginald Cancellor.

Parry, Serjt., and *Knapp* for the prosecution.

Ballantine, Serjt., and *G. Denman* for the defence.

The prisoner was a schoolmaster at Eastbourne, and in 1859 the deceased, a boy aged thirteen or fourteen, had been entrusted to his charge. He was a dull boy. At Christmas there were some complaints of chastisement in-

flicted on him by the prisoner. He returned to school, however, after the holidays, and again at Easter on the 16th April.

On the 18th April the prisoner wrote to the father, stating that the boy was obstinate, and that, were he his own child, he should, after warning him (as he had done), subdue his obstinacy by chastising him severely; that, if necessary, he should do it again and again, and "continue it at intervals, even if he held out for hours." The letter concluded thus:—"I cannot be blind to the fact that at Christmas I ran a serious risk of having my character damaged for life, and I do not think it right to run that risk again, I therefore write this to know your wishes."

On the 20th April the father wrote in reply, "I do not wish to interfere with your plan."

There was no evidence that the boy had been guilty of any obstinacy after Easter, and the prisoner had, just before Easter, reported favourably of him.

On the night of the next day, Saturday the 21st April, the prisoner took the boy into a room down stairs, and beat him for about two hours, between ten and twelve, with a thick stick; using also a skipping rope.

About midnight the prisoner was heard dragging or pushing the boy up stairs to his bedroom, and there he beat him again, until about half-past twelve, when the beating and crying suddenly stopped.

From the evidence of the servants (who were the principal witnesses as to all this) it appeared that the prisoner and his wife were for some time going up and down stairs engaged in washing out the stains of blood down stairs and up stairs, but that some of these stains were discerned next morning.

Early next morning (about seven) the prisoner said he had found the boy dead, and almost "stiffening." He then went for a surgeon, who saw only the face of the boy.

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A subsequent examination showed that the thighs and other parts of the body were covered with bruises, and the medical evidence was that there had been profuse bleeding and extravasation of blood caused by excessive and protracted beating, and that the immediate cause of death was exhaustion arising therefrom.

The medical witnesses also stated that, upon the evidence, coupled with the prisoner's statement, the boy, at seven o'clock in the morning, must have been dead about six hours, so that their evidence went to show that he died about half-past twelve, when the beating was heard suddenly to cease.

The prisoner had not avowed the beating until its effects had been discovered by the *post mortem* examination, and had sent the body home so closely wrapped up, that the bruises were not detected until the coverings were removed in consequence of rumours prevailing. There was no *post mortem* examination of the body prior to the inquest, at which the surgeon, who had seen only the boy's face, was examined, and the prisoner, who suggested that the boy had died of disease of the heart. The verdict of the coroner's jury, therefore, did not inculpate him.

[The father had since died, and the elder brother was prosecutor.]

Parry, Serjt., put in, for the prosecution, a printed slip from a newspaper, containing a report of the inquest, pasted on paper, with corrections and alterations in the prisoner's hand, sent by him to the prosecutor on the 27th April, and which did not mention the beating. He examined the prosecutor as to a conversation with the prisoner on the 24th April, at which the beating was not mentioned.

Ballantine, Serjt., in cross-examining, asked as to a conversation with the prisoner after the newspaper report had appeared, in which the prisoner desired to take the prosecutor to one Clark, who was on the jury, to hear his

account of an explanation which it was suggested the prisoner had given, but,

Parry, Serjt., objected that Clark should be called; and,

COCKBURN, C. J., was of that opinion. It is not part of the same conversation as that of which the prosecution gave evidence.

Parry, Serjt., in re-examining the prosecutor, asked as to a letter which the prisoner had written to the father at Christmas, complaining of the complaints made as to his chastisement of the boy, and called for the letter of the father (to which that was an answer), notice to produce it having been given and proved.

Ballantine, Serjt., did not produce it.

Parry, Serjt., produced a copy in the father's handwriting, but the prosecutor could not prove its correctness, and knew nothing of the original except from the father (*a*).

Ballantine, Serjt., objected, and

Parry, Serjt., did not press the evidence (*b*).

The stick was produced in Court, and appeared at one end an inch thick; at the other end it was edged with brass about the circumference of a sixpence, and there were holes in the shins of the deceased corresponding therewith, and which the medical witnesses thought must have been produced by poking therewith.

The prisoner called no witnesses (*c*), except as to character.

(*a*) There are no degrees in secondary evidence, so that the copy was not necessary; *Doe* d. *Gilbert* v. *Ross*, 7 M. & W. 102. But the difficulty was that oral secondary evidence could not be given, as the witness had not seen the letter.

(*b*) The charge being for manslaughter, not murder, as to which it would have been material to show that the complaints at Christmas had rankled in the prisoner's mind, and inspired ill-will towards the deceased.

(*c*) There was therefore, strictly speaking, no evidence that the boy

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REGINA v. HOPLEY.

COCKBURN, C. J. (to the jury).—By the law of England, a parent or a schoolmaster (who for this purpose represents the parent and has the parental authority delegated to him), may for the purpose of correcting what is evil in the child inflict moderate and reasonable corporal punishment, always, however, with this condition, that *it is* moderate and reasonable. If it be administered for the gratification of passion or of rage, or if it be immoderate and excessive in its nature or degree, or if it be protracted beyond the child's powers of endurance, or with an instrument unfitted for the purpose and calculated to produce danger to life or limb; in all such cases the punishment is excessive, the violence is unlawful, and if evil consequences to life or limb ensue, then the person inflicting it is answerable to the law, and if death ensues it will be manslaughter (*a*). The first question is, whether the death was caused by the beating inflicted? Secondly, was it excessive in degree? Now, there can be no doubt as to the first point, that the boy's death *was* occasioned by the beating received at the hands of the prisoner.

Then as to the second point, whether the beating was excessive, the question can surely be only answered in one way; for had the correction been moderate it is contrary to common experience that it should have resulted in death. One can scarce conceive of *moderate* chastisement resulting in death, except under circumstances of a very peculiar character, or in the case of a child with an unusual organization. We have, however, here positive evidence as to

had been guilty of any obstinacy at all, save the prisoner's own letter; which would not have been evidence in his own favour. However, the prosecutor having only made a charge of *manslaughter*, of course it did not become material to dispute that there was lawful cause for punishment; and therefore the prisoner's letter, so representing, was put in, and it was taken that his statements therein made were true. It is necessary to notice this, lest it should be supposed that excessive beating, resulting in death, without evidence of lawful cause or excuse, had been held merely manslaughter. It was taken as if there had been lawful cause.

(*a*) That is (as the context implies), *at least* manslaughter. *Vide supra, et vide post.*

the nature, amount and degree of punishment inflicted. It was inflicted with a thick stick; it was continued down stairs for two hours and up stairs for half an hour longer, and according to the medical evidence until the boy actually died. That question, however, it is not material now to determine, viz., whether the boy did not actually die under the beating so protracted. For whether he did so die or not, if he died from the effects of the beating then or subsequently, and it was excessive, the prisoner is guilty of manslaughter (*a*). The evidence to my mind is all one way, that the boy died *at the time*, and under the prisoner's hand, but that upon this charge does not matter. The stick with which the punishment was inflicted was not (though that, may be, is matter for you to determine) (*b*) an instrument fitted for the purpose of chastisement. And the beating was manifestly protracted far beyond the bounds of reason, moderation or humanity. If you think that it was so, and caused the death of the boy, find the prisoner guilty.

It is true that the father authorized the chastisement, but he did not, and no law could, authorize an *excessive* chastisement.

There can be no doubt that the prisoner thought the boy obstinate, but that did not excuse extreme severity and excessive punishment.

The prisoner's *motives*, however, upon this charge matters not. If his excessive violence caused the death find him guilty.

Verdict, guilty.

Sentence, four years' penal servitude.

(*a*) That is, *at least* guilty of manslaughter. The language of the C. J. implied that, on another charge, the question, whether the prisoner went on beating until the boy died, might be material.

(*b*) The instrument, being in its own nature *not* unfit, the mere size or weight might be for the jury. But if it had been in its own kind and nature utterly unfit—as, if it had been the poker—it would have been for the Court as a matter of law.

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Maidstone, coram Cockburn, C. J.

BERRIDGE AND ANOTHER *v.* WARD.

Summer Assizes.

In an action for laying obstructions on an alleged roadway in front of the plaintiff's land, so as to prevent his access to it, except from an old gateway:—*Held*, that the question was whether the way was a public highway or merely a private way; for, in the former case, the plaintiff would be entitled to free access to it from any part of his land, and there being strong evidence of *ancient* user by the public: *Held*, that mere temporary acts of obstruction by the owner of the adjoining land would not be material, as they would have been if the right were vested merely on modern dedication.

TRESPASS for entering the plaintiff's land and digging.

Second, third and fourth counts: for digging on a piece of land over which the plaintiff alleged that he was entitled to a right of way, either public or private, on foot or with horses, &c., so as to obstruct such way.

Pleas: 1. Not guilty.

2. (To the first count.) Not possessed.

3. (To the same.) That the *locus in quo* was the soil of the defendant.

4, 5 and 6. Denying the rights of way alleged in the other counts. Issue.

Bovill, Lush and *G. Denman* for the plaintiff.

Chambers, Hawkins and *Hannen* for the defendant.

In 1852, an estate was sold by Clark & Co., auctioneers, in seventy lots, by particulars and plans. In the particulars the general description of the land comprising the *locus in quo* ran thus:—"Several of the marshes abutting on the main road next Mill Town, present eligible sites for building purposes."

The description of lot 27 was,—"A valuable freehold estate with considerable frontage to the high road, and part suitable for building purposes." And the description of lot 30 was thus:—"A freehold estate adjoining the preceding lot, consisting of a close of arable land, No. 57 on plan, containing 11 acres and 5 perches."

The plaintiffs purchased lots 26, 27, 28, 29 and 30.

The deed conveying the land to the plaintiffs recited, that several pieces of land had lately been put up for sale by Clark & Co. in 70 lots, according to certain particulars and subject to certain conditions of sale then produced, at which the plaintiffs were the purchasers of the piece of

land described, and then it conveyed to them all those pieces of land situate, &c., called, &c., containing the quantities herein mentioned, and comprised in lots 26, 27, 28, 29 and 30, as delineated in the plan in the margin of the deed, together with all *roads, ways,* &c., and all rights and privileges and appurtenances to the said pieces of land belonging or appertaining. And the plan in the margin described lot 30 as 11 A. 0 R. 5 P., being the parcel described in the particulars of sale as lot 30.

The defendant had become the purchaser of other lots adjoining the plaintiffs.

Lot 30 abutted on the alleged way or road, running between Mill End Town, Sheerness, and Minster, and parallel with the Ordnance "sea wall."

The defendant had dug open and placed bricks upon the said alleged roadway in front of that lot, so as to obstruct the access therefrom to the roadway, except at a particular gateway, where the access was left open. The effect of this, if rightful, was, that the defendant would be precluded from building on this lot, as the houses would have no access to the roadway.

The defendant had built houses upon his lots, with access to the roadway.

Bovill, for the plaintiff, called Clark the auctioneer, who produced the particulars and conditions of sale.

M. Chambers objected that they were immaterial, as the parties were now bound by the deeds of conveyance.

COCKBURN, C. J.—Upon the question of parcel or no parcel, which is for the jury (*a*); they are admissible and may be material (*b*), for they are *referred* to in the deed.

(*a*) Roscoe on Evidence, p. 14; *Luck* v. *McIntyre,* 12 Cl. & Fin. 151; *Dyne* v. *Nutley,* 14 C. B. 122; *Heming* v. *Burnet,* 8 Exch. 187; 22 L. J., Exch. 79.

(*b*) In *Rhodes* v. *Barlow,* 1 C., M. & R. 439, the plans were made *after* the deed; in *Williams* v. *Morgan,* 16 Q. B. 782, the agreement was four years *before* the deed. *Barton* v. *Dawes,* 10 C. B. 26, was similar.

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Lush.—Moreover, the owner and his vendors would be bound by any apparent easement, as delineated on a plan exhibited to purchasers at the time of the purchase.

COCKBURN, C. J.—That is so, no doubt (*a*).

M. Chambers contended that it was only the plan upon the margin of the deed which was admissible; but

COCKBURN, C. J.—The plan exhibited to purchasers and referred to, with the particulars in the deed are admissible as the basis of the transaction, and as interpreting the deed in which they were incorporated by reference.

M. Chambers.—The plan is only referred to for the numbers marked upon it, in order to identify the different lots; it has nothing to do with boundaries.

COCKBURN, C. J.—That may or not be so as matter of construction; but at present the only question is, whether the particulars and plans are admissible, and I think they are so.

The particulars and plans were then put in; and

Bovill, having asked the auctioneer whether he stated that the plans truly represented the state of the property when sold, proceeded to ask as to the meaning of a double dotted line running parallel with the sea-wall, and which it was suggested represented a roadway.

M. Chambers objected to such explanations or interpretations of the plans, which must speak for themselves.

COCKBURN, C. J.—It must be shown either that this was brought to the knowledge of the defendant, or that every one would so understand the plans.

The witness stated that the defendant (an attorney resided at Sheerness, where the sale took place), had the plans, and that the dotted line represented a roadway;

(*a*) *Glave* v. *Harding*, 27 L. J., Exch. 290, *acc.*

that it was the ordinary mode of representing an occupation roadway or right of way, and that every one used to plans would so understand it.

Strong evidence was given of the use of the alleged roadway by the public for upwards of forty years. It led from Minster to Sheerness, and appeared to be the *only* road between those places, running all along parallel with the sea-wall, and between it and a large tract of marsh land intersected by watercourses. Part of the way opposite, a lot purchased by the defendant, and built upon, had been lighted and paved by the parish. For the defendant it was attempted to be shown that the user of the way was not of right, and that gates had been put up within twenty years, and once or twice locked; but it appeared that they had been forced open when locked, and did not interrupt the right when not locked, but were usual in marshy land to keep the sheep from straying.

At the close of the plaintiff's case,

M. Chambers submitted:—1. That there was no evidence of *ownership* in the plaintiff, as the land adjoining or abutting on the *locus in quo* was described in the deed as in the occupation of one A., and there was no inference of ownership to the centre of the alleged way, as it was not a *public* highway, there being no evidence of dedication to the public.

2. That there was no right of access to the way except by the old gateway.

COCKBURN, C. J.—Both points depend upon whether the way is a *public* way or a private way. If a *public* roadway, then there would be a right of access to it from any part of the plaintiff's land abutting upon it. As to the non-dedication, it is not a question of modern dedication, but of ancient user. There is evidence that there was an ancient highway. If so, then dedication is not the question; and the evidence as to the putting up of

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the gates, so far from being against the right is evidence in its favour; for the gates were *not* allowed to be locked, and the right of way *was* exercised. To make these interruptions of any avail, there must have been a *submission* to them. Where the right is based on recent dedication, the putting up of gates is strong evidence against the right, but it is otherwise when there is evidence of ancient user.

M. Chambers went to the jury, and called evidence, which failed to disprove the user.

He proved that by measurement the close, No. 30, if it included the *locus in quo*, *i. e.*, the part of the alleged way in front of it, would contain, not 11 A. 0 R. 5 P., as described in the deed, but 11 A. 1 R. 40 P. (*a*).

He did not, however, produce the deeds of the *defendant*, nor call him as a witness (*b*).

COCKBURN, C. J. (to the jury).—Is the *locus in quo* a highway, either by ancient user or by modern dedication? If it be a highway up to the boundary of the plaintiff's land, then, as a matter of law, the plaintiff has a right of access to it from any part of his land. If it was an ancient highway—that is, before the time of living memory—there need be no further inquiry. And if the public generally have used it beyond the time of living memory, then it is an ancient highway. And if it were once such a highway, nothing which the owners of the adjoining land may have done temporary to obstruct the rights of the public by gates, &c. could divest it of that character. If the public used the way before the time of living memory, it matters not that it may have been a mere beaten track, and not a hard, *made* roadway.

Then, as to dedication—supposing you think it was not an *ancient* public highway—did the owner of the land,

(*a*) On the question of ownership, that would not be conclusive. See *Manning* v. *Fitzgerald*, 29 L. J., Ex. 24.

(*b*) *McKewen* v. *Cutcheon*, 27 L. J., Exch. 41.

even without qualification, dedicate the *locus in quo* as a highway? In that point of view no doubt the acts of interruption are more material, to show that the owner *never* so dedicated the way; but if it was once so dedicated it could not be divested.

Verdict for the plaintiff on the second count.

Coram Blackburn, J.

BURTON AND ANOTHER *v.* BANKS.

Summer Assizes.

On a contract by a letter of the defendant, assented to by the plaintiffs, to take a farm off their hands, provided he was accepted by their landlord on *the covenants in their lease: Held*, that they were bound to procure and deliver to him the lease, and it having been deposited as security for a loan, and they not having procured it, the plaintiffs were nonsuited.

DECLARATION, that C. B. and W. B. had been tenants of a farm for a term, which had just been determined, and were entitled by the terms of the lease to be paid by the landlord on the determination of the lease for certain acts of tillage and husbandry done by them to the farm during the term, the benefit whereof was left by them for the incoming tenant of the farm. That they were also possessed of fixtures, which they were entitled to remove on the determination of the term. That they had thereupon by deed assigned to the plaintiffs all their right and interest in the same, of which the defendant had notice, who had just before been let into possession of the farm, as incoming tenant thereof, by one A. the landlord. That thereupon the plaintiffs, with the consent of A., agreed with the defendant to sell to him, and the defendant agreed with the plaintiffs to purchase of them, their said right and interest for a price to be fixed by two valuers.

Averment, that the plaintiffs did accordingly sell to the defendant, and he purchased of them their said right and interest, and the defendant took the benefit of the said tillage, &c. to his own use; that the price was duly fixed by valuers on each side at the sum of 463*l.* 13*s.* 6*d.*

Breach: non-payment.

Second count, on an account stated.

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Pleas: 1. That C. B. and W. B. were not tenants as alleged.

2. That their term had not been determined.

3. That they were not entitled by the terms of the lease to be paid for the said tillage, &c.

4. That the said acts of tillage had not been done, nor was the said manure, &c. left in the farm, nor where the said fixtures, as alleged.

5. That the said C. B. and W. B. had not assigned by deed to the plaintiffs their said right and interest.

6. That the defendant had not been let into possession of the farm as incoming tenant thereof by A., as alleged.

7. That the plaintiffs did not, with the assent of A., agree with the defendant, as alleged.

8. That the plaintiffs did not sell to the defendant, as alleged.

9. That the said price was not duly fixed according to the agreement, by valuation, as alleged.

10. (To the last count.) Never indebted.

Bovill, J. Brown and *Finlason* for the plaintiffs.

Lush and *Beresford* for the defendant.

On the 29th September, 1855, A., the landlord, granted to C. B. and W. B. a lease of the farm for twenty-one years, providing that they should leave all dung, manure, &c. remaining unspread on the farm for the use of the lessor and his incoming tenant at the expiration or sooner determination of the term, being paid for the *labour* thereon by valuation; and that they also should leave the hay, straw and fodder of the last year for the use of the lessor and his incoming tenant, on being paid a feeding price for the same by valuation; and that they should also be paid for crops in the ground and all dressings at a valuation; the clause as to valuation being, that the *landlord* should pay for the above according to a valuation, at the end or expiration of the term.

There was a covenant not to assign or otherwise part with the possession of the premises, and a condition of re-entry as breach.

The lease was executed with a counterpart. The lessees became embarrassed in 1859, deposited the lease with one Bassett for a small advance. [It did not appear whether this was with such a written memorandum or agreement as would make an equitable mortgage.]

On the 4th January, 1860, the lessees assigned all their estate, right and interest in the farm, and all stock, &c., to the plaintiffs, in trust for creditors, and they entered into possession.

They immediately saw one Allen, the landlord's agent, and told him that the lessees would not carry on the farm; he offered to get a tenant who would pay them on a valuation, and they assented to that.

A few days afterwards the agent introduced the defendant to them as a proposed tenant. The plaintiffs asked a premium, but the agent said that, as the lease was forfeited, they could only be allowed to be paid a valuation.

Nothing was said about the lease being given up to the defendant.

On the 20th January the defendant wrote to the plaintiffs thus:—"I am willing to take the farm, provided I am accepted by your landlord on the covenants in the lease, by paying a valuation according to the lease, but no further" (*a*).

This appeared to have been assented to. In a day or two the stock, &c., was sold by auction, and the defendant bought a great part of it and was let into possession. At the sale one of the plaintiffs promised the defendant "to get the lease," but nothing was said about an *assignment* of it.

On the 14th February the valuers met and the valuation

(*a*) Inspection and copy of this and of the deed had been granted by a Judge at Chambers to the defendant.

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was made, being headed "valuation of tenant's property at, &c., from C. B. and W. B. to F. Banks;" the amount (including fixtures) was 463*l.* 18*s.*, and it was signed by both valuers. In the valuation the manure had been disallowed, as the lease was deemed by the landlord's valuer to be forfeited, and the plaintiffs had only been allowed a tenant's valuation.

When payment was demanded, it was contended, on the part of the defendant, that he was entitled to delivery up of the lease, and there had been an *assignment* of it actually executed by the lessor; but the lease itself had not been procured, nor had the assignment of it been delivered to the defendant.

This was objected to by the plaintiffs on the ground of the disallowance of the manure (*a*).

Brown made an attempt to prove his case by calling one of the plaintiffs to state a conversation which he had heard between the valuers in the presence of the defendant, but this failing to show a contract with the plaintiff to pay him, he put in the letter, upon which,

BLACKBURN, J., finding that the implied contract raised in that letter, assented to as it had been, could not be altered (*b*), ruled that the construction of the letter was for him (*c*), and that it meant that the lease should be procured by the plaintiffs (as otherwise there would be a flaw upon the title of the defendant); and the disallowance of the manure, because the landlord's valuer *deemed* that the lease was forfeited, could not affect the question, whether that were so or not, the contract was on condition that the defendant should be accepted tenant on the covenants in the lease, which implied that the lease should be given up, and

(*a*) Even if it had been, a nice question might have arisen, if not in law, in equity; *Newton* v. *Beck*, 27 L. J., Exch. 37.

(*b*) So that the *letter* contained the terms of the contract; *Stone* v. *Dowla*, 29 L. J., Exch. 122.

(*c*) *Griffiths* v. *Rigby*, 25 L. J., Exch. 287; *Hodges* v. *Paterson*, 26 L. J., Exch. 223.

the valuation was to be according to the lease. Therefore there must be a

Nonsuit (*a*).

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(*a*) Thereupon the parties agreed as to terms.

Guildford, coram Cockburn, C. J.

PARNELL *v.* STOCK.

Surrey Summer Assizes.

An application to postpone a cause on account of the absence of a witness, allowed on condition that, in the event of speedy execution being granted, the four days should count from the day on which the cause originally stood for trial.

THIS was an action on a bill of exchange, commenced under the Bill of Exchange Act, and in which the defendant had obtained leave to appear and defend, on the 28th June last, upon an affidavit, in which, stating his defence, he swore that he could not then find a certain witness to subpœna him.

Hawkins, for the defendant, now, before the cause was called on, it standing early in the list, applied for leave to postpone the trial for a few days, on the ground of the absence of the same witness; the affidavit stated that he was a material witness, and that the deponent believed and understood he had been *subpœnaed*.

Honyman, for the plaintiff, opposed the application, on the ground that if the defendant really desired and intended, or was able to find and serve the witness, he would have done so before (*a*), and delay might endanger the plaintiff's recovery of the money.

COCKBURN, C. J.—The plaintiff must not be prejudiced; and as, supposing there appears no excuse for defending the action, speedy execution would be granted, which means in four days, I will allow a postponement for four days; but it must be understood that, in that case, the four days are to count from *to-day;* so that, in the event of the plaintiff getting a verdict, he may, if I grant speedy

(*a*) *Vide Ward* v. *Wilkinson, ante*, p. 173.

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execution, issue it *immediately* upon signing judgment, which he may do forthwith. Upon those terms (which were assented to),

Cause postponed.

Surrey Summer Assizes.

HUTTON *v.* HAMBORO.

A private right of way over waste land, or a line between two points, is not necessarily a right over every part of the land, and the owner of the soil may enclose on each side of it, leaving a convenient way.

TRESPASS for taking the plaintiff's posts, &c.

Pleas: justifying under a private right of way, alleging that the posts obstructed it.

Bovill, Lush and *Denman* for the plaintiff.

Hawkins, Hannen and *Watkin Williams* for the defendant.

The posts were gate posts at the bottom of a lane leading to Putney Park, along which lane the defendant in common with the plaintiff had a right of way, and the question was, whether the gate had narrowed that right.

In 1824, all the property including the soil of the lane belonged to Lord S., and he leased Putney Park to one L., with a right of way over and along the lane.

In 1835, Lord S. and L. conveyed to the plaintiff Putney Park "with all ways, rights, &c. thereunto appertaining," &c.

In 1855, Lord S. conveyed to the defendant "all that piece or parcel of land commonly called Putney Park Lane, situate, &c., and all waste and other lands nigh or belonging thereto, and situate on the sides of the lane and heretofore taken to be part of it," &c.

There was in the centre of the lane a hard part with a grassy margin on each side, which enlarged a little at the bottom end where there had been a kind of sweep round into the road. The plaintiff had erected a lodge at the bottom of the lane with a line of palings on each side, coming at a right angle across the bottom of the lane, cutting off part of the grassy sweep and putting a gate in

the middle as wide as the hard or central part of the lane, to show that the soil in the part of the lane, alleged to have been encroached upon, had not passed to the defendant.

There was evidence that L. had permission from Lord S. to enclose a piece of the lane so as to alter the sweep as above described; that this was before the conveyance to the defendant, and that there had been no alteration of the sweep since then. The defendant's house was like the plaintiff's up the lane.

COCKBURN, C. J.—It seems to be a question of law, whether, if there is a private right of way over any land the owners of the land can define or confine it within reasonable limits. As at present advised, it appears to me that there is this distinction between a private and public right of way, that the former is not necessarily, as the latter is, over every part of the land, access or along which there is the right of way.

Hawkins then tendered evidence to show that the gateway had so narrowed the way that the right could not be so conveniently exercised as before, and such evidence was received.

The gate, however, appeared to be as wide as a turnpike gate, and the road was fifty feet wide.

COCKBURN, C. J. (to the jury).—The question is, whether practically and substantially the right of way can be exercised as conveniently as before, or whether the defendant has really lost anything by the alteration made by the former owner and continued by the plaintiff? If you think that for all practical and useful purposes the way is the same as before, find for the plaintiff, if you think otherwise, find for the defendant.

Verdict for the plaintiff (*a*).

(*a*) Leave to move on the question of law, *ut supra*. Rule *nisi* granted in Exch., M. T.

1860.

Surrey Summer Assizes.

An agreement with an attorney, that he shall get his costs out of the fund in the suit, implies the condition that he is continued in the conduct of the suit until there is a fund in Court available for costs.

HOLLINGS *v.* BOOTH.

ACTION for work and labour as an attorney.

Plea: never indebted.

The case for the defendant was, that the attorney, the now plaintiff, was to get his costs out of the fund.

The defendant, however, had changed his attorney before the suit had come to a close, so that there was no fund available for the purpose of the costs, and on the order to change the attorney, the costs had been taxed as usual.

COCKBURN, C. J.—Even if there was such an agreement as is alleged on the part of the defendant, it must be deemed to have implied in it the condition, that the attorney should be retained to carry on the suit until there should be a fund in Court available for the costs. Here, however, the client, the now defendant, has changed his attorney before this could be, and has thereby annulled the special agreement on which he relies, and entitled the plaintiff to recover a proper remuneration for the work he has done.

Verdict for the plaintiff.

Surrey Summer Assizes.

Where an attorney had distrained upon a tenant whom he had put into possession on the part of the owner, and contrary to an agreement he supposed he had authority in law to make in the owner's name, but which it appeared he had not; *held*, that he was not liable in trespass, and *quære*, whether he would be liable at all.

OXENHAM *v.* SMYTHE (*a*).

FIRST count: for trespass in entering on and distraining and keeping possession of the plaintiff's land, &c.

Second count: for converting his goods.

Third count: that plaintiff was tenant to one J. Collins of a public house; that Collins had seized certain of his goods as a distress for rent, and that thereupon the defendant being the attorney of Collins, and representing that he was authorized by Collins to act as his attorney in

(*a*) See the prior action of *Oxenham* v. *Collins*, *ante*, p. 172.

that behalf, it was agreed by and between the plaintiff and the defendant as such attorney, on behalf of Collins, that as consideration the plaintiff would then pay certain charges, and the costs of the defendant as attorney, and a certain sum on account of another debt, and give a bill for the rent due, Collins would forthwith withdraw from the possession of the goods, and not take any proceedings for the residue of the rent for six months.

Averment of performance on the part of the plaintiff.

Breach: that within six months the defendant representing that he was authorized so to do, did in the name of Collins take proceedings for the said rent, and distrained, &c. By means whereof the plaintiff was prevented from selling his business, &c., and thereupon trusting on the representations of the defendant, and believing that he had been so authorized by Collins as aforesaid, and acting on his behalf as well in the said agreement as in the said distress, *sued* Collins (*a*) in an action, &c., which action Collins defended by the defendant as her attorney, and the plaintiff was nonsuited therein, by reason of the defendant not having been authorized by Collins as aforesaid (*b*), and by reason that the defendant, who was called as a witness on the trial to prove the authority from Collins to him to put in the distress, denying any authority (*c*) from Collins to him as her attorney, either to put in the distress or enter into the agreement in that behalf; whereby the plaintiff has not only suffered the damage aforesaid but has expended monies in unsuccessfully suing Collins as aforesaid, and has paid 95*l.* to her for her costs of defending the said action.

(*a*) *Vide Oxenham* v. *Collins*, *ante*, p. 172.

(*b*) Not so. Rather by reason of WIGHTMAN, J., so holding in *Oxenham* v. *Collins*, *ante*, p. 172.

(*c*) Not so. He denied any *actual* authority, and stated the facts, from which he inferred a *general* authority in law, which WIGHTMAN, J., held did not exist. There was no authority in *fact* asserted by the defendant.

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OXENHAM v. SMYTHE.

Fourth count: that the defendant, pretending to the plaintiff that he was acting as attorney for and on the behalf of one Collins, and was authorized by her, had prepared an agreement purporting to be made by and between Collins and the plaintiff, whereby Collins agreed to let, &c.

Averment, that the plaintiff believing that Collins was landlady of the premises (*a*), and that the defendant was her attorney, and the defendant representing that he was acting as her attorney, it was agreed, &c. (as in the third count.)

Fifth count: that the plaintiff was tenant of certain premises, &c., and that the defendant pretended that he was authorized on behalf of the landlords (*b*), &c., promised that he would not proceed for the recovery of the rent within six months.

Breach: that he did proceed by distress within that period.

Pleas: 1. Not guilty.

[There were other pleas not material.]

10. That it was not agreed by and between the plaintiff and the defendant as *such attorney on behalf of Collins*, as alleged.

M. Chambers and *Wood* for the plaintiff.

Hawkins and *Garth* for the defendant.

The original agreement, signed only by the plaintiff, was offered in evidence.

It was objected that it was not stamped. It was answered that it was not an agreement, being signed only by *one* of the parties (*c*).

COCKBURN, C. J.—It may nevertheless be a "minute or memorandum" of an agreement, and, as "evidence" of

(*a*) There was hardly a warranty of Collins's title.

(*b*) *Vide supra.*

(*c*) *Vide Coker* v. *Young*, *ante*, p. 98.

it (*a*), may require a stamp. The stamp and penalty must be paid, but if I alter my opinion they may be returned by the officer.

The money was paid, and not returned.

The authority to distrain was put in, signed by *Collins*.

The agreement declared upon was also put in, purporting to be between Collins and plaintiff, and signed by the defendant "W. Smythe."

The receipt for the money paid by the plaintiff was put in, signed by defendant in the same way. This was in *January*, 1859.

The notice to the bailiff to withdraw was likewise put in, signed by the defendant, thus:—"W. Smythe, solicitor for E. Collins."

After the withdrawal, in June, 1860, the broker came in again, and continued in possession until the goods were sold. [The re-entry was within the six months; but the *sale* was *after* they expired.]

Evidence was given of the defendant's evidence at the trial of the former action, to the effect that he was not the private attorney of Collins; that he had no actual authority from her; and that he was acting only under the Court of Chancery as her attorney in the Chancery suit.

But it did not appear that he had been examined as to any *ratification*; and it is to be observed that he was called for the *plaintiff* in the former action, and was examined as an adverse witness, and *not* (of course) *cross*-examined (*b*).

The judgment of nonsuit was pressed, and payment to

(*a*) *Quære*, evidence of the *agreement* or of the *terms* of it? *Vide* cases cited in *Coker* v. *Young*, *supra*.

(*b*) Moreover it would be contrary to public policy to permit a party in any way to be harassed by action on account of his evidence as a *witness*. And in the former action the now defendant was the attorney of Collins, and bound to do his best to defend her.

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the defendant, as attorney for Collins in the former action, of 94*l.*, the taxed costs thereon.

Neither Collins nor the defendant was *now* called; but it was taken as a fact that she had given him no actual authority.

A written agreement by the plaintiff, that Collins should be "considered as in possession for the space of six months," was put in.

Hawkins contended that there was no cause of action on the *first* count in trespass; and

COCKBURN, C. J., was of that opinion (*a*), the sale not having been till the six months had expired.

Hawkins submitted that upon the other counts there was no case; but,

COCKBURN, C. J.—It must be assumed that the defendant stated the truth at the former trial, and that he had no authority (*b*) from Collins; and that, upon the facts as he stated them, he had no authority to act for Collins (*c*). But he represented to the plaintiff that he had, and therefore is liable personally to him according to the doctrine laid down in *Collen* v. *Wright* (*d*).

Hawkins offered to prove that the defendant acted under the authority of the Court of Chancery.

COCKBURN, C. J.—It is the case of the plaintiff that he did so, and you can hardly prove it by parol, nor otherwise than by regular proof of the proceedings in Chancery.

[*Hawkins* did not tender such evidence.]

COCKBURN, C. J. (to the jury).—It has been laid down by

(*a*) A distress, in violation of an agreement, but after rent was due, would not be a *trespass*.

(*b*) In *fact*.

(*c*) That would be matter of *law*; *vide ante*, 221.

(*d*) 27 L. J., Q. B. 215. But that case, and all others of the same class (as *Randall* v. *Trimen*, 25 L. J., C. P. 307), rested on falsehood in *fact*, and the doctrine is not to be *extended*; *Robson* v. *Turnbull*, Vol. I. p. 365; *Swinfen* v. *Lord Chelmsford*, *ib.*, p. 619.

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a Court of Error, and I am bound to direct you, that if a man falsely represents to another that he has the authority of a third person to contract, he is personally liable himself. Now here the defendant, in signing these documents, represented that he was the general attorney of Mrs. Collins, whereas it appeared that he was *not;* and the plaintiff, who would otherwise have had a remedy against her, was deprived of such redress, and failed in his action against her by reason of the absence of authority (*a*).

The defendant is not liable as a trespasser, for the plaintiff took the premises from him (either as agent for Collins or not), and the rent was due; and if the defendant was agent of Collins to distrain, his act has been ratified, for the plaintiff has never been troubled for the rent again, and doubtless was duly received.

But on the count for false representation the defendant is liable on the ground I have stated.

Verdict for the plaintiff, 100*l.* (*b*).

(*a*) In *law; vide ante*, 221; *et vide Ewer v. Jones*, 9 Q. B. 263, and 16 L. J., Q. B. 42; whence it appears at least doubtful whether he had *not* such an authority.

(*b*) As agreed. Leave to move. A *rule nisi* granted in Exch., M. T. 1860.

PRIDEAUX *v.* M'MURRAY.

Surrey Summer Assizes.

When a man purchases a patented article, with a known title, there is no implied warranty that it will answer any particular purpose; but it is for the jury whether there was an *express* warranty, and the mere fact that in printed invoices or prospectuses the invention is described as effecting an object, is not in itself conclusive evidence of a warranty.

ACTION for goods sold and work and labour, and for licences to erect plaintiff's patent invention for regulating the supply of air to and preventing the radiation of heat from furnaces.

Plea: never indebted.

Bovill and *Hannen* for the plaintiff.

James and *Lloyd* for the defendant.

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The particulars of demand (100*l.* having been paid) claimed as follows:—

	£	s.
"Two furnace doors, as per contract (10*l.* each)	20	0
"Royalty on 114 sq. feet grate-bar surface, at 10*s.*	57	0
"Three new self-closing valves . . .	7	4
"Preparing three new doors, and fixing to new boilers	7	10
"Attendance, &c.	4	4
	"£96	6"

The prospectus of the plaintiff's patent was as follows:—

"Prideaux's *self-closing furnace valve*, and an apparatus which acts independently of any superintendence, and cannot get out of order."

There were directions for applying and working the apparatus:—"Provided the furnace and its doors be properly constructed, so as to prevent anything very defective in the draught of air."—"If the application of the valve should not *entirely remove all smoke*, and its area is insufficient for the process of cooling furnace, and therefore the quantity of coal supplied should be lessened by the furnace being cooled more frequently, or the area of the valve should be increased."

The invoices of the plaintiff's invention had printed headings—"Smoke-preventing Company;" but the name or title of the invention (as already shown) did not include smoke-prevention.

The defendants were paper-makers at Wandsworth. In 1856, four furnace doors were put up at their factory. They then saw the plaintiff, who came down to Wandsworth, and advised them to abandon the old doors altogether, and said his new doors were perfect. The defendants ordered twelve, and in February he fixed them; they

not interfering at all. They resembled in their construction Venetian blinds; the idea being of the air rushing in between the bars, so that the smoke should become subject to combustion and be thus consumed. In March 100*l.* was paid on account.

In April the defendants were summoned and convicted under the Smoke Prevention Act (16 & 17 Vict. c. 128) for unlawfully using a certain furnace not constructed so as to consume its own smoke. On the hearing both the defendants and the plaintiff were examined for the defence, and defendants gave evidence to show that the furnaces *did*, or might, consume their own smoke; but the plaintiff also stated that in his opinion the doors were too small, that he had made no alteration in the furnaces, and had only supplied the doors and fixed them to the then existing mouths of the furnaces.

It appeared, however, that before the summons the defendants had complained that the apparatus would not work properly, and that the defect was in the motion of the bars, which was regulated by the action of quicksilver; which, it was asserted, was a process too delicate of adjustment for common workmen.

There was a great deal of evidence on both sides as to the cause of the defective action, it being admitted on both sides that the apparatus in point of fact had *not* worked so as to prevent smoke, and the contest being as to the *cause* of the failure; the case for the defendants being that it was the defect of the patent, or the fault of the plaintiff in not fixing the doors properly; the case for the plaintiff being that it was from a want of proper adjustment.

COCKBURN, C. J. (to the jury).—The question comes to this, whether there was any express warranty that the apparatus would prevent smoke? For, as to the doors, they could not be larger than the mouths of the furnaces, which

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were already built; and as to the alleged defect in the process, it was inherent in the nature of the apparatus which the defendants bought. If a man orders a *patented* article, which he knows, or might know of, it being matter of public knowledge (*a*), he must be taken to know what it is, and to judge for himself as to its value. In such case there is no *implied* warranty that it will answer any particular purpose or object. There may, however, be an *express* warranty; and then, unless it answers the warranty, the plaintiff cannot recover the stipulated price. Then the question is whether there has been such a warranty. The *term* warranted need not be employed, there may be language equivalent to it, and implying, and conveying to the mind of the purchaser, that the party supplying the apparatus undertakes that it shall answer the purpose. It is for you to say whether there has been here such an undertaking—that the apparatus will answer the purpose of making the furnace consume its smoke. It is for the defendants to make that out, he having purchased a patented article. If there was a mere representation, or expression of *belief* on the subject, then there was no warranty (*b*). But was there any *undertaking* that the invention should answer the object? The plaintiff denies it; and it is for you to say whether, even if you believe the defendants, what they say *amounts* to it.

Verdict for the plaintiff (*c*).

(*a*) *Vide Oliphant* v. *Bailey*, 5 Q. B. 288; *Camac* v. *Warriner*, 1 C. B. 356.

(*b*) *Hopkins* v. *Tanqueray*, 23 L. J., C. P. 162.

(*c*) The breach of warranty might, though no answer to the action, have gone in reduction of damages; *Parsons* v. *Sexton*, 2 C. & K. 266; 4 C. B. 899.

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CHURCHWARD *v.* CHAMBERS.

Surrey Summer Assizes.

The messman of a regiment having once distinctly refused to serve up dinner until threatened with arrest: *Held*, rightly dismissed, although it was in a moment of irritation, and next day followed by an apology. The mess committee having been changed, and the dismissal being by the new committee, *semble*, that the action was not maintainable.

ACTION by the messman of a regiment against the president of the mess committee for a wrongful dismissal (*a*); the declaration stated that the plaintiff and *defendant* agreed, that the plaintiff would supply dinners, &c. on the terms of three calendar months' notice.

Averment, that the plaintiff entered into, and was received into the service *of the defendant*, &c.; and general averment of conditions precedent.

Breach: wrongful dismissal.

Pleas: 1. Denying the contract &c.

2. The plaintiff's readiness and willingness to continue in the service.

3. That the plaintiff misconducted himself in the said service; in this, that he wilfully disobeyed reasonable orders of the officers of the mess committee, and wilfully refused to supply dinner, and used impertinent language, and quarrelled with and assaulted another servant of the officers, and was guilty of riotous and insubordinate conduct in the barracks, wherefore he was dismissed.

4. That at the time of the making of the agreement the defendant was president of the mess committee of the officers of the regiment, and he entered into the agreement as such president for and on behalf of the committee, and on the terms and conditions, *inter alia*, that in the event of the committee going out of office the *incoming* committee should be bound under the agreement.

Averment, that before breach the mess committee, of which the defendant was president, was changed and the defendant went out of office, and thereupon the plaintiff entered into the service of the new committee and ceased to be in the service of the defendant.

(*a*) A grave question might have arisen as to the proper party to be sued.

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5. That before breach the agreement was abandoned by mutual consent.

James and *Pearce* for the plaintiff.

M. Chambers and *T. Chitty* for the defendant.

The agreement in writing was headed "Between the Mess Committee of the regiment and R. Churchward, messman," and it was signed by the defendant. It contained the terms alleged, both in the declaration and the special plea.

The circumstances of the dismissal as proved in evidence were these:—After the change of the committee there was a *fracas* between the plaintiff and another servant whom he assaulted, and in consequence of the altercation he declared that he would have nothing more to do with the mess, and refused to send up dinner. After some minutes' delay, the *colonel* of the regiment then came down and asked the plaintiff if he meant to send up dinner? to which the plaintiff replied that he would not, and used some language not respectful, upon which the colonel threatened to send for a file of soldiers and put him under arrest. Thereupon the plaintiff served up dinner, which had been delayed nearly half an hour.

The new mess committee held a meeting next day and dismissed the plaintiff. He tendered an apology, but they deemed it too late, and considered the offence too serious (*a*).

COCKBURN, C. J., was of that opinion, and thought there was a just ground of dismissal. He considered, moreover, that it was very doubtful whether the action could be maintained. He asked the jury whether they considered there had been such misconduct as to justify dismissal? They said that they did. Thereupon,

Verdict for the defendant.

(*a*) See Mr. Manley Smith's excellent Treatise on "*Master and Servant*," p. 76, cited, with approval by the Court, in *Horton* v. *McMurtry*, 29 L. J., Exch. 264.

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BAMFORD *v.* TURNLEY.

Surrey Summer Assizes.

Brick-kilns near a dwelling-house, purchased with notice, *held*, no nuisance; and, on a count for keeping ash heaps in the process of brick making, plaintiff held entitled only to nominal damages.

DECLARATION, that the plaintiff was possessed of a dwelling-house, &c. in which he dwelt, and that the defendant erected certain brick-kilns on certain land of his adjoining and near to the said dwelling-house, and wrongfully burned a large quantity of bricks in such kilns, and caused noxious and unwholesome vapours and smokes, fumes and smells to arise from the said kilns, and spread themselves over and about the said dwelling, &c. whereby the air about the same became unhealthy and uncomfortable, and the plaintiff was annoyed and incommoded in his possession and enjoyment of his dwelling.

Second count: that the defendant placed large quantities of ashes and bones and decomposed vegetable and other matters on certain land of the defendant adjoining and near to the plaintiff's dwelling-house, and wrongfully kept the same there, and caused unwholesome smells and stenches, vapours and gases to arise from thence, and be diffused over and about the plaintiff's dwelling and infect the air about the same, whereby the air was rendered offensive and unhealthy, and the plaintiff was annoyed and incommoded in the possession and enjoyment of his dwelling and was otherwise greatly injured.

Pleas: 1. Not guilty.

2. Not possessed.

James, Petersdorff, Serjt. and *Garth* for the plaintiff.

Lush, Hawkins and *Honyman* for the defendant.

The plaintiff had purchased his house on conditions and particulars of sale, mentioning "that the adjoining land was fit for brick-making."

The defendant had bought the adjoining land of the same owner, and had commenced brick-making thereon, accumulating heaps of ashes for the purpose which he brought from other places, not working up only the brick-earth excavated on his own land.

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The plaintiff, and some members of his family gave evidence, "that they were annoyed by the smell and smoke from the kilns, and in some slight degree from the heaps of ashes which contained some small admixture of decaying animal or vegetable matter, but the former was the chief ground of complaint, and as to the latter, the defendant's evidence showed that the ashes were sifted in the usual way before being brought to his premises, and that any small admixture of the decaying matters alluded to was accidental and unavoidable.

Moreover, the evidence for the defendant showed that he conducted the brick-making in all respects in the ordinary mode, and that the kilns and ash heaps were placed on the most convenient spots for the purpose, and as far as practicable from the plaintiff's house.

And auctioneers and land agents, &c. were called for the defendant, to prove that it was quite usual to sell land, even in and about the metropolis, with such announcement as above-mentioned, "land fit for brick-making," and that it greatly enhanced the value of the land. That it was customary to work up the brick earth on building land, for the purpose of brick-making, that this was usual in all large towns, and that there was nothing noxious or offensive in the smells from the kilns, nor any thing which was ever considered a nuisance to neighbouring houses.

For the defendant the case of *Hole* v. *Barlow* (*a*) was cited, and

COCKBURN, C. J., in accordance therewith, directed a verdict for the defendant on the first count, and as to the second count, that being merely ancillary to the main ground of complaint, the plaintiff could only have nominal damages, and he should not certify for costs.

Verdict accordingly (*b*).

(*a*) 27 L. J., C. P. 207.

(*b*) A rule *nisi* was granted.

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Coram Blackburn, J.

HOTSON *v.* HOWITT.

Surrey Summer Assizes.

An order to insert advertisements, *held*, not revocable after accepted, and the defendant held liable for the insertion of the advertisement for a year, notwithstanding notice not to insert it.

ACTION for the price of certain advertisements published by the plaintiff.

Plea: never indebted, except as to 15*s.* paid into Court.

The particulars claimed 63*l.* for the insertion of an advertisement in *Hotson's Time Tables* for a year.

M. Chambers and *Joyce* for the plaintiff.

Hawkins and *Woollett* for the defendant.

One Miller, an advertising agent, obtained an order from the defendant in writing, signed by him for the insertion of the advertisement for a year, at 15*s.* each insertion.

After 7*l.* 10*s.* had been incurred, the defendant gave notice to the plaintiff not to insert the advertisement any more, but it was inserted for the whole year.

The case for the defendant was, that he did not read the contract, and supposed it was for a single insertion, and that he was not liable for more, or at least not for more than 7*l.* 10*s.*

BLACKBURN, J. (to the jury).—The question for you is, whether the defendant was induced to sign the contract by the fraud of the plaintiff's agent? Whether, in such a case, the plaintiff would be responsible for the fraud, is another question, one of law, it not being set up that the plaintiff knew or could know of it. There being the defendant's signature to the contract, the question is, did he know what he signed (*a*)?

The jury found that he did.

Hawkins insisted that there could only be a verdict for the sum incurred before the notice, but

(*a*) See *Lewis* v. *Great Western Railway Company*, 29 L. J., Exch. 425; and *Rideal* v. *Same*, Vol. I., p. 706.

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BLACKBURN, J., thought otherwise, there being a contract for the whole time, offering, however, to leave it to the jury whether the value of the advertisement was any less by reason of the countermand.

Hawkins, however, declined this, consequently

Verdict for the plaintiff for 55*l.* (*a*).

(*a*) On the ground that the contract was not like one of service, which the plaintiff *could* not render, if refused; *Goodman* v. *Pocock*, 15 Q. B. 576; nor an authority revocable, *Florence* v. *Taplin*, 10 C. B. 744; *Chappell* v. *Bray*, 30 L. J., Ex. 24; but for services which he *had done*. A rule was granted, in C. P.

Crown Court, coram Blackburn, J.

Surrey Summer Assizes.

While the Judge under the commission of assize, the high sheriff has no right to address the grand jury, and his doing so against the prohibition of the Judge, *held*, a contempt of Court.

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THE grand jury, having concluded their business, came into Court with the remainder of the bills; and,

BLACKBURN, J., dismissed them, thanking them in the usual form for the assistance they had rendered to the administration of justice.

It appears that the high sheriff of the county, W. J. Evelyn, Esq., had requested the learned Judge to pay the compliment to the gentlemen who had attended, but who had not actually served on the grand jury, of thanking them for their attendance, as many of them had come a considerable distance to perform the duty, but the learned Judge said he considered it unnecessary to do so, and it was understood that the high sheriff expressed his intention of thanking them himself.

When the learned Judge had addressed the grand jury was about to proceed with a trial that was before the Court,

The high sheriff rose, and, addressing a number of magistrates who were on the bench, began to speak.

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BLACKBURN, J., interposed, and said that he could not allow the high sheriff to proceed, and must request him to desist.

The high sheriff still seemed determined to go on, when the learned Judge laid his hand on his shoulder, and said he could not permit him to speak, and he must request him to sit down.

The high sheriff still persisted.

BLACKBURN, J., threatened that if he did not desist he would fine him.

Still the high sheriff would not sit down, and,

BLACKBURN, J., said:—"Mr. High Sheriff, I feel myself called upon to fine you 500*l.*"—[His Lordship then directed Mr. Avory, the deputy clerk of assize, to record the fine, which was done.]

The high sheriff still would not desist, and,

BLACKBURN, J., then threatened to commit him for contempt of Court (*a*) if he did not sit down.

The high sheriff then resumed his seat.

Later in the day, the high sheriff came into Court and read a written apology, in which he expressed his sorrow for having committed any act which might bear the semblance of a contempt of the Court.

BLACKBURN, J., stated that he had no personal feeling, but must protect the dignity of the Court, and could not allow any improper interruptions to the business of the assize.—[His Lordship then remitted the fine.]

(*a*) The question was mooted at the time, by what force the sheriff could have been committed in case he had resisted; but there could be no difficulty. The Judge of any Court has a clear right to commit any person unlawfully disturbing it, and if the sheriff had no right to address the jury, he was an unlawful disturber of the Court. The gaoler would be bound to obey the warrant, (see *Stockdale* v. *Hansard*, 9 A. & E. 1,) and any constable would be bound to execute it, and any number of persons would be justified in aiding in its execution.

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Coram Cockburn, C. J., and Blackburn, J.

On a subsequent day, the learned Judge, finding noise made by persons walking about in a covered place, between the Court and the street (*a*), separated from the Court by a railing only, and otherwise open to it on the one side, and the street on the other, ordered that place to be cleared, which was accordingly done.

The Judge of assize has authority to order the Court, or any part of it, to be cleared, if quiet is not preserved in it, and the sheriff is bound to execute his orders, and to preserve quiet. And if, instead of that, he incites his officers to disobey such orders, he is guilty of a high contempt of Court. And a placard issued by him and posted on the outside of the walls of the Court, while the judge was sitting, *held* such a contempt.

The high sheriff was present, and did not either object to the order or assist in clearing the place and preserving the quiet of the Court (*b*).

Towards the end of the assizes, the sheriff having left the town, the following placard appeared posted up in the town upon the outside of the Crown Court, in which BLACKBURN, J., sat.

"TO THE FREEHOLDERS AND INHABITANTS OF THE COUNTY OF SURREY.

"Gentlemen,—On Friday, the 3rd of August, Mr. Justice BLACKBURN, in my presence, but without addressing himself to me, ordered that part of the Court which is appropriated to the public to be cleared, at a time when perfect quietness prevailed among the public, who were there present according to custom. From that time the public have been barred out from the Court where Mr. Justice BLACKBURN presides, and the prisoners have been tried and causes heard without the possibility of the law being fulfilled, which requires that 'so many as will or can' shall 'come so near as to hear.' As your sheriff, and feeling that the general dissatisfaction is well-grounded, it is my duty to record my protest against this unlawful proceeding; and I have given directions that the Court shall be opened again to the public, according to the custom and the law. All persons, so long as they conduct themselves with decorum, have a lawful

(*a*) The courts in this county being in this and every other respect remarkably incommodious, and ill-adapted for the due administration of justice, as the Lord Chief Justice, at this Assizes, and other Judges, on former Assizes, have complained.

(*b*) As it was his duty to have done, the sheriff being especially charged with the duty of attending, as the Queen's officer, the Queen's Judges; of protecting them from all disturbance, and aiding them in preserving due quiet around them while engaged in the administration of justice. He is, in fact, the officer of the Courts; *vide post*.

right to be present in Court; and I hereby prohibit my officers from aiding and abetting any attempt to bar out the public from free access to the Court.

"I am, Gentlemen, your faithful servant,

"WILLIAM JOHN EVELYN, Sheriff."

COCKBURN, C. J., being informed hereof, immediately directed that the sheriff should be ordered to attend the Judges, and in the meantime, it is believed, communicated with Lord Campbell, then Lord Chancellor, and lately Lord Chief Justice of the Queen's Bench.

On the appointed day the high sheriff accordingly appeared before both Judges.

COCKBURN, C. J., demanded of him whether the placard which had been posted outside the walls of the Court had been placed there by his authority.

The high sheriff answered that it had.

COCKBURN, C. J., then inquired what explanation he had to give for such a proceeding?

The high sheriff then rose, and said he was glad to have that opportunity of offering an explanation of the course he had pursued in publishing the placard. That course he had not taken without deliberation, and he was bound, with the greatest respect and deference to their Lordships, to affirm that he believed he had discharged his duty to the county of Surrey as the high sheriff appointed by her Majesty. He complained that Mr. Justice BLACKBURN had ordered a part of the Court to be cleared of the audience, and that the officers had actually executed the command. This, he respectfully contended, was an illegal act, and had the effect of invalidating the verdicts which had been afterwards returned; and, this being so, he considered it obligatory on him to do what he believed the duties of his office required at his hands, viz., to assert the illegality of the course pursued by the learned Judge, and to command his officers not again to obey such orders from the Court. The high sheriff then stated that he distinctly

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disavowed, on his honour as an English gentleman, the least intention to offer any personal insult to the learned Judge. He could only say, in conclusion, that he desired to treat the Court with all respect and submission, and that the step he had taken was taken upon a sound conviction that in ordering an English Court of Justice to be cleared of the auditory the learned Judge had assumed an illegal authority, and one which he (the high sheriff) felt bound to disobey, as the chief officer of the county.

Their Lordships having consulted,

COCKBURN, C. J., then addressed the high sheriff as follows:—Mr. High Sheriff, the Court has heard with anxiety and sorrow the statement which you have addressed to them, amounting, as it does, to an entire justification of what we, as her Majesty's Judges of Assize, sitting as the representatives of the sovereign, feel to be a most improper, unlawful, and unseemly contempt of our office, and of the administration of justice. Mr. High Sheriff, you have most unquestionably mistaken both the law and the facts. You have mistaken the *law*, for the power and authority of her Majesty's Judges, acting in pursuance of her Majesty's commission, are perfectly well defined and established, and the course taken by my learned Brother was one which he had the most undoubted right to adopt. It is at once conceded that English Courts of Justice are open to the public in the fullest sense, and I trust they ever will remain so; but it was going far beyond either law or necessity to avow, as you Mr. High Sheriff have done, that there is no power reposed in the presiding Judge to order such modifications of the arrangements of the Court as are indispensable to that which it is the office of a Judge to carry out: viz., the efficient administration of justice. You are equally mistaken, Mr. High Sheriff, as to the *facts*. The truth is, that no part of what is properly to be called the *Court* was ordered to be cleared. The fact is that my learned Brother ordered the lower part of

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the Court, open to the street, and not the other parts of the Court, to be cleared, because the examination of witnesses in criminal cases, when prisoners were standing on their trial, was inaudible to the Court and jury, and there was surely a transparent necessity for the order which my learned Brother conveyed to the officers of the high sheriff. But, even were it otherwise, it is undoubtedly in the power of the Judge, in his discretion, to order the Court or any part of it to be cleared if due quiet is not preserved. It was your duty, Mr. High Sheriff, to take all necessary means to preserve such quiet, and to set the example of obeying an order which the Judge might give for that object. You, Mr. High Sheriff, had not made the least complaint or remonstrance before you left the assize town, and yet thought fit to issue this placard and have it posted on the walls of the Court while the Judge was still sitting, openly inviting your officers to disobey any future orders of the same kind which he might give. You have stated, and of that the Court is perfectly assured, that you, as an honourable English gentleman, neither have intended, nor are capable of offering, any personal indignity to her Majesty's Judges; but the course which you have pursued is clearly a contumacious contempt of the Court, and a most serious reflection upon the authority of the Judges' commission, which emanated from the Crown, and demands, especially from the high sheriff, as one of her Majesty's most important officers of justice, obedience and respect. I consider it my duty, Mr. High Sheriff, to fine you 500*l.*

The fine was immediately recorded (*a*).

(*a*) The Home Secretary stated in his place in Parliament his approval of the course taken by her Majesty's Judges on this occasion.

As this case is without parallel, at least in any known record, and is of considerable historical and constitutional interest, some observations may be admissible. Undoubtedly the sheriff (shire-reeve) is an old Saxon officer of the very highest *antiquity*, far higher indeed than that of Justices of Assize. In point of authority, however, in

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their presence, he is but a ministerial officer, whereas they are not only the highest judicial authorities known to the common law in the counties in which they sit, but they, by virtue of their commission, represent the Crown, in its judicial character, in as high and plenary a sense as the Judges of the Superior Courts at Westminster. It so happened that on this occasion both the Justices were Judges of the Court of Queen's Bench, who at common law had cognizance of all criminal cases, in any county (Reeves's Hist., Vol. II. p. 49). But this point, one purely antiquarian, would not differ the case practically, for the Justices itinerant have, by virtue of their commissions, all the authorities and powers of the Superior Courts (*Ibid.* p. 50). The sheriff is clearly the minister of those Courts, liable in contempt for not executing their sentences (*R.* v. *Beardmore*, 2 Burr. 292), bound to obey the writs issuing therefrom, and liable to attachment if he neglects to do so. So far, then, from having any peculiar privilege or power of resisting the orders of the Judges, the sheriff is of all men bound to enforce them. He is there for that purpose, and for no other. He is the Queen's officer, and they represent the Queen in her Courts of Justice, and he is bound to preserve quiet, and protect them from disturbance. In the learned arguments in the case already cited, *Stockdale* v. *Hansard*, 9 A. & E. 1, will be found all the cases as to the power, inherent in all Courts, of committing persons guilty of contempt, and in *Garnett* v. *Ferrand*, 6 B. & C. 611, where it was held that a coroner could turn a person out of the room in which he was about to hold an inquisition, although it was recognized that Courts of Justice are public, the discretionary power of excluding persons disturbing the proceedings seems equally recognized. The privilege of publication of proceedings in Courts of Justice rests on the same principle; yet Judges have always exercised a discretionary power of restraining publication until the completion of the proceedings, and have committed for contempt in disobeying their injunction. Therefore the discretionary power to exclude persons is clear; and may be shown in another way. No one could doubt it as to one or two persons, or any number of persons, who fail to keep silence. And if it is impossible to detect the particular offenders, (as it is the sheriff's duty to do), there must be the same power of excluding all who are in any particular part of the Court whence the disturbance emanates, and, in an extreme case, the power of clearing the Court altogether. The sheriff therefore had either been guilty in the first place of a neglect of duty in not keeping silence, if he could, or if he could not, then the clearance of the Court ordered was necessary. Inferior Courts can only commit for contempts *in* Court (see the cases upon that subject collected in *Levi* v. *Moylan*, 1 L. M. & P. 307). But it is otherwise of a Court of that high dignity which belongs to one of the Superior Courts, or to a Court of Assize, and especially in the case of *one of its own officers*. Had the sheriff in Court verbally

incited his men to set at nought the orders of the Judge, of course there would have been a clear contempt, even in the case of an Inferior Court; and the law was not less clear in the case of a Supreme Court, when placards, while it was still sitting, were posted on the walls of the Court itself, tending to the same result, viz., resistance and disturbance. Probably a private person would be liable, for such an act, to be committed summarily while the Assizes continued, as undoubtedly he would be liable to indictment and to fine or imprisonment for a misdemeanor. But the sheriff, as the *officer* of the Court, was clearly liable to summary punishment, *even* if a stranger would *not* have been. And the sheriff's mistake was in fancying that he had an *immunity*, or any inherent authority, whereas he was, on the contrary, as a ministerial officer of justice, under a peculiar duty and responsibility.

NORFOLK CIRCUIT.

Norwich, coram Cockburn, C. J.

CORY *v.* BOND.

Spring Assizes.

LIBEL. The declaration set forth a letter published by the defendant in a newspaper, referring to some informations which had been laid by the plaintiff—clerk to the magistrates before whom it was laid—for trespassing on his and other persons' lands in search of game, and which went on thus:—"I cannot wonder at the hostility which is so commonly evinced at the game laws, when I see so much wicked oppression under cover of them; indeed it is monstrous that a magistrate's clerk, to gratify his own spiteful feelings and personal pique, should be permitted to resort to proceedings like the present, which serve the

Where, in libel, the defendant had charged the plaintiff with having, on a certain occasion, acted from motives of spite and *lucre*, and pleaded a justification, which failed as to the *latter* feature of the charge, *held*, that the libel being entire, the defendant was not entitled to a verdict on the plea as it stood, or to any part of it, and *quære*, whether it might be amended.

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double purpose of giving him a few paltry fees, and at the same time of wreaking his revenge."

Pleas: 1. Not guilty.

2. That the words complained of were true in substance and in fact. Issue.

O'Malley and *Couch* for the plaintiff.

Power and *Keane* for the defendant.

After the evidence had closed—it having been proved that the plaintiff did not take fees in cases where he was personally concerned—

COCKBURN, C. J.—The plea as to that part of the libel which relates to the putting fees into the plaintiff's pocket is not sustained.

O'Malley thereupon claimed the verdict, on the ground that an entire plea to the *whole* failing as to part, failed *in toto* (*a*).

COCKBURN, C. J.—I can amend the plea under the Common Law Procedure Act (*b*), by confining it to so

(*a*) Had the plea been special instead of general in form, it must have justified in terms the charge as to the fees, which perhaps was not a *distinct charge*, severable in point of time, according to the test applied in *Clark* v. *Lawson*, 6 Bing. 266, or like the *beating* in an action for assault and battery (*Philips* v. *Howgate*, 5 B. & A. 220), but rather an essential or substantial ingredient in the one entire charge made, viz., that the plaintiff had laid the informations from spite and *for lucre*, the latter of which was not justified; *Edwards* v. *Bell*, 1 Bing. 403.

(*b*) That is, the amendment clause, s. 222: "All such amendments as may be necessary for the purpose of determining the *real question in controversy between the parties* shall be made." If the "real question" on the plea was whether the libel *or any part of it* was true, then the amendment would be allowable. It was not contended that the plea was *distributive* under sect. 75, and *semble* it was *not* so; *vide post*. That section is "that pleadings *capable of being construed distributively* shall be taken distributively, and if issue is taken thereon, and so much thereof as shall be *sufficient answer to part of the causes of action proved*, shall be found true by the jury, a verdict shall pass for the defendant in respect of so much of the causes of action as shall be answered, and for

much of the libel as is justified; that is, *excepting* the words in question relating to the fees.

O'Malley.—Even if that is done there will be a libellous charge left unanswered, and on that the plaintiff must have a verdict (*a*).

COCKBURN, C. J. (to the jury).—The justification fails as to the fees, but that is a small portion of the libel.

The jury inquired if they were at liberty, notwithstanding that, to find for the defendant on the plea of justification.

COCKBURN, C. J.—No, you cannot do that; so far as that charge is concerned the plea fails. Your verdict, therefore, as far as that part of the libel is concerned, must be for the plaintiff, with such damages as you think the plaintiff, under all the circumstances, is entitled to receive. But if you think that with regard to the rest of the libel the justification is made out, your verdict in that respect will be for the defendant, and I will give leave to amend so that the verdict, in that view, may be so taken.

The jury found as follows:—"We find our verdict for the plaintiff for such part of the libel as relates to the fees, with one farthing damages; and for the defendant on all the other parts" (*b*).

Verdict for the plaintiff, damages one farthing.

the plaintiff in respect of so much of the causes of action as shall *not* be answered." But this leaves the question open whether in this or any other particular case the plea is "capable of being construed distributively," and the rest of the clause seems to imply that it is so only where there are severable, not *several*, "causes of action."

(*a*) Clearly so. *Vide post.*

(*b*) The *postea* was entered thus as to the second issue:—"Except as relates to the words which serve the purpose of giving him a few paltry fees." The jurors say that the said words were true in "substance and fact." It was taken that the plea was amended in the same way:—"Except as to the words, &c., that the said words were true, &c." The effect of this would have been to give the *defendant* costs, but in T. T., the Court of Exchequer made absolute a rule, the effect of which was to deprive the *defendant* of costs upon any part of the pleadings. Had this been suggested to the C. J. he probably would have made it part of the *terms* of amendment.

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Coram Erle, C. J.

LYNN *v.* COMER AND ANOTHER.

Norfolk Summer Assizes.

Issue being taken on pleas justifying a trespass, in the exercise of an alleged right, with a general averment that all times had arrived, &c.: *Held*, that evidence was admissible to show that the entry was not at a proper time, and that, the plaintiff having resisted the entry on that ground, an amendment, if necessary, would be allowable.

TRESPASS for entering land, &c.

There were two counts, complaining of entry on different lands.

Plea: 4. (To the first count.) That the plaintiff was in possession of the land as tenant to one Ives for a year (from and to the 11th October), subject to an agreement, *inter alia*, that Ives should have the option of sowing the small seeds in the *spring* of next year; that he had exercised the option; that all things had happened and *all times* had arrived and elapsed necessary to entitle him or his servants in that behalf to enter for the purpose of sowing the said seeds pursuant to the said agreement; and that the alleged trespasses were an exercise of the defendant's servants, and by his command, of the said *right*. Issue.

Plea: 5. (To the second count.) That the plaintiff was in possession of the land as tenant, &c. on the terms, *inter alia*, that the land should be given up at the end of the time to the incoming tenant, according to the custom of the country; and that, according to such custom, the incoming tenant had the option, *in due time* for the fair exercise of such option, of sowing, &c. at the *proper time* for sowing next before the commencement of his tenancy.

Averment, that the defendant Comer had by virtue of an agreement with Ives become the incoming tenant of the lands at the end of the plaintiff's term, and *in due time* for the exercise of such option, and at the said time when, &c., the same being a proper time for so doing, *all times had elapsed and arrived necessary* to entitle him to enter, &c. Issue (*a*).

(*a*) See sect. 79 of the C. L. P. Act, 1852 (Finlason's Ed., 1860, p. 93), that this is to be deemed a denial of the *substance* of the pleading. And of course performing or happening of conditions precedent are "the substance" of a defence founded thereon.

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Bulwer for the plaintiff.

Keane for the defendant.

The plaintiff was tenant of the land, subject to the right as pleaded; and the defendant, as incoming tenant, had entered to exercise that right, but the plaintiff had resisted the entry on the ground that the proper time for the exercise of the right had not arrived.

On the part of the plaintiff evidence was offered to show that the proper time had not arrived (*a*).

On the part of the defendant it was objected that such evidence would not be admissible without a special replication; but

ERLE, C. J., held that the evidence *was* admissible (*b*); and if it were not strictly so on the pleadings as they stood, he should amend the replication, as it appeared that it was the real matter in controversy between the parties at the time (*c*).

(*a*) The C. L. P. Act, 1852, s. 57, provides, that the defendant or plaintiff may aver performance of conditions precedent generally, and the opposite party shall not deny such averment generally, but shall specify in his pleading the condition precedent, the performance of which he intends to contest (see Finlason's C. L. P. Acts, Ed. 1860, p. 85). But then, *if* the averment is denied generally, it is in issue, (the remedy being a summons to *compel* the other side to amend, under sect. 52), and on issue taken on a plea, the whole substance is in issue. See sect. 79, *ibid.* p. 93.

(*b*) *Vide Eyre* v. *Scovell*, 5 C. B. 702, where ERLE, J., had allowed at Chambers a traverse on a plea, which was held, at and after the trial, to have admitted affirmative evidence of title on the part of the plaintiff, to destroy the supposed title of defendant. See, however, cases in which a special replication has been required; *Pearson* v. *Underhill*, 16 Q. B. Rep. 120; *Jones* v. *Jones*, 16 M. & W. 699. See a case *contrà*, *Powell* v. *Bradbury*, 7 C. B. Rep. 201; but see *Lush* v. *Russell*, 4 Exch. 637. The latter was a decision lately upheld in the same Court, *Horton* v. *M'Murtry*, Exch. Rep. 184. It has been held that the provisions in the C. L. P. Act, 1852, 15 & 16 Vict. c. 76, ss. 77—79, allowing a plaintiff to traverse the whole of a plea, by a general denial, only enable him to traverse generally what he might have traversed before, and no more is put in issue than before, nor any more evidence admissible; *Glover* v. *Dixon*, 9 Exch. Rep. 158.

(*c*) See *Wilkin* v. *Reed*, 15 C. B.

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Rep. 192, showing that the C. L. P. Act only authorizes such amendments at *Nisi Prius* as are necessary to raise the real question which the parties *intended to have tried*, not anything which was not in controversy before. The above case is useful as a practical illustration both of the principle of pleading and the rule of practice as to amendments.

[The above is reported *ex relatione*, *Keane* and *Bulwer*, with the aid of the pleadings.]

Bedford, coram Erle, C. J. (*a*).

HOGG AND OTHERS *v.* ANN NORRIS AND JOHN BERRINGTON.

In an ejectment against two defendants for premises of which the husband of *one* had formerly been tenant to the plaintiffs, evidence that after his death, above twenty years ago, she had remained for some time in possession of the premises, but that within the twenty years, the premises being occupied by the other defendant (her son-in-law), she admitted that she had paid rent:—*Held*, evidence that the other defendant was under-tenant to her.

THIS was an action of ejectment brought by the parish officers of Biggleswade, in the county of Bedfordshire, to recover possession of a plot of land called "The Hundred Acres," which was claimed to be the property of the parish.

The defendant Norris was the widow of a person of that name who had been for many years in possession of the property; and the other defendant was her son-in-law.

In order to prove a payment of rent within twenty years a witness was called, who proved that five years before this action was brought he had made a demand on Norris on the part of the parish officers for the rent due. That Norris then said, "The rent has not been called for for three or four years. I kept it ready, but as no one called for it, I spent it." And that she then admitted that she had paid the rent from her husband's death in 1838, down to the year 1841. The defendant Norris was not called, but it was proved in cross-examination of this witness that Norris, at the time of this conversation, was not in the occupation of the premises, but that they were occupied by the other defendant, Berrington.

Brown submitted that this was not sufficient evidence to go to the jury. Even supposing that the fact of an exist-

(*a*) Reported by H. Markby, Esq.

The custom of the country is not admissible to prove that a notice to quit, served on the 5th of April, is a good notice to quit, by reason of the tenancy being a Michaelmas tenancy, but it must be proved by direct evidence that such is the case.

ing tenancy up to the year 1841 had been proved as against Norris, the presumption was that, Berrington being in possession, that tenancy had ceased. Then, as against Berrington, there was no evidence whatever. The only evidence in the case was the admission of Norris, which could not be used against him. Being in possession without any evidence of how he came into possession or that he had ever in any way acknowledged a tenancy, must be presumed to be owner in fee.

Erle, C. J.—I think the evidence is sufficient to justify me in leaving the case to the jury. The probability is, that the defendant Berrington was under-tenant to the defendant Norris. If that is not so there could be no difficulty in disproving it on the part of the defendants. But I will, if necessary, reserve the point.

It then became necessary to prove a notice to quit; and for that purpose a notice served on both the defendants on the 5th of April was put in, to quit at Michaelmas. In order to render this a sufficient six months' notice, evidence was tendered of the custom of the country to enter and quit at Old Michaelmas and not at New Michaelmas.

Erle, C. J.—That evidence is inadmissible. The custom of the country cannot be set up against the legal presumption that Michaelmas means any other day than the 29th of September. You must show by direct evidence that this was an Old Michaelmas tenancy.

This evidence was then given and the jury found a

Verdict for the plaintiffs.

Keane and *Couch* for the plaintiffs.

D. Brown for the defendants (*a*).

(*a*) In Michaelmas term last, *Brown* obtained a rule *nisi* in pursuance of the leave reserved for a new trial, on the ground of misdirection. Cause was shown in the course of the term, but no judgment was delivered, the case having been compromised. As to the point reserved, see *Doe* v. *Webber*, 1 A. & E. 733; *Doe* v. *Williams*, 6 B. & C. 41.

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Ipswich, coram Pollock, C. B. (*a*).

FEGGETT *v.* BARKER.

In an action for false imprisonment, with a plea of justification, alleging certain grounds of suspicion, plea not allowed to be amended by alleging others not put forward before.

THE first count in this action was for an assault.

The second count for causing a policeman to take the defendant into custody and detain him on a charge of felony.

The third count was for a malicious prosecution.

The defendant pleaded first, not guilty.

Secondly, that the defendant's barley had been stolen from him, and was found concealed in the plaintiff's barn; and,

That the plaintiff falsely asserted the barley to be his, and refused to give any satisfactory account of how he came by it; and the defendant having reasonable and probable cause for suspecting, and in fact suspecting, that the plaintiff was the person who had feloniously stolen the barley, gave him into custody, &c.

The evidence of the plaintiff was, that the defendant came with a policeman to his house and asked to see his barley; that he showed them the barley which was not in any way concealed; and that the policeman took a sample of it; and that he was afterwards given into custody by the defendant.

The policeman was called by the defendant, and was asked whether, before the defendant gave the plaintiff into custody, he (the policeman) had not by the plaintiff's directions compared the sample of the plaintiff's barley with the barley of the defendant.

O'Malley, for the plaintiff, objected that this evidence was not admissible under the second plea, as it was not one of the grounds of suspicion mentioned *in the plea*.

POLLOCK, C. B., so held.

Keane, for the defendant, applied for leave to amend the plea by inserting this ground in it.

(*a*) Reported by H. Markby, Esq.

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POLLOCK, C. B. (after consulting ERLE, C. J.), said:—I had no doubt myself about the propriety of refusing the application made on the part of the defendant, but, as I had an opportunity of consulting my brother ERLE, I have done so, and he entirely agrees with me. Any person has by law the power to act on a well-grounded suspicion; that a felony has been committed by giving the suspected party into custody. But the grounds must, if they be relied on as a defence to an action of this kind, be stated in the plea and proved as stated. Here the defendant has stated his grounds of suspicion in the plea as something different from that upon which he now seeks to rely on. I have no doubt that I am right in saying that he cannot be allowed to do this, especially as the circumstances must all have been prominently before the parties at the time the plea was pleaded.

Verdict for the defendant.

O'Malley and *Couch* for the plaintiff.

Keane for the defendant.

At Chambers, coram Blackburn, J.

REGINA *v.* THE MASTER AND WARDENS OF THE SADDLERS' COMPANY.

A shareholder may be bail for his company.

Members of a corporation, holding office therein, may be bail for the corporation, in error brought by the corporation.

MANDAMUS to restore an assistant, return and traverse thereto, ending in a special verdict, on which the Court of Queen's Bench gave judgment in favour of the prosecutor and awarded a peremptory mandamus; the defendants brought error and put in bail, the bail being two of the wardens of the company.

Summons to set aside the bail on the ground of their being wardens, also two of the plaintiffs in error, and two of the persons to whom the peremptory mandamus would be directed if issued.

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H. F. Gibbons, in support of the summons.—The Common Law Procedure Act, 1852, sect. 151, provides that the person in whose name error be brought, together with two or more sufficient sureties, shall be bound to the party for whom judgment is given, otherwise execution shall not be stayed. The statute clearly means two persons independent of the plaintiff in error, here the bail are constituent members of the corporation, and to a certain extent identical with the plaintiff. Money cannot be paid into Court in lieu of bail in error unless by consent (*a*), so there can be no substitution for independent bail.

Prentice, contrà, was not called on.

BLACKBURN, J.—It is not pretended that the bail are not responsible persons, and I know of no authority to show that a shareholder in a railway company cannot be bail for the company, none has been cited. I will therefore make an authority, and refuse an order.

Summons dismissed.

(*a*) *Collins* v. *Gwynne*, 2 Moo. & Sc. 775.

Central Criminal Court, coram Pollock, C.B., Martin, B. and Hill, J. (*a*).

REGINA *v.* WILLIAM DAVISON.

Where a man was indicted, pleaded not guilty, and was given in charge to a jury who retired to deliberate, and had not agreed upon a verdict by the time all the rest of the business before the Court was finished, when they were discharged by the presiding Judge, and the prisoner remanded:—*Held*, that the dismissal of the jury was not equivalent to an acquittal, and that the prisoner might lawfully be put upon his trial a second time.

The same rule prevails, whether in cases of misdemeanor or felony.

THE prisoner was indicted at the last adjourned General Quarter Sessions for the county of Middlesex for indecently assaulting a little girl, and pleaded not guilty. The jury before whom he was tried, after remaining in consultation a considerable time, were brought into Court, and then stated to the presiding magistrate that they had not agreed,

(*a*) Reported by W. Lovesey, Esq.

and were not likely to agree, upon their verdict. Upon this, all other business at the sessions being disposed of, the presiding magistrate, in the exercise of his discretion, discharged them; and the case having been removed by *certiorari* to the Central Criminal Court, the prisoner pleaded to a similar indictment the following plea:—

"The said William Davison, &c., &c., saith, that our sovereign lady the Queen ought not further to prosecute the said indictment against the said William Davison, because he saith that heretofore at the adjourned General Quarter Sessions of the Peace holden at Westminster, in and for the county of Middlesex, before William Henry Bodkin, Esq., Joseph Payne, Esq., and others the justices of the peace, being then and there duly assembled to hold the adjourned Quarter Sessions of the Peace in and for the said county, &c., a jury of twelve good and lawful men were then and there duly empannelled and sworn to try the issue above knit or joined between our sovereign lady the Queen and the said William Davison; and the jurors so sworn and empannelled were then and there duly charged with the said William Davison, who was then and there duly given in charge to the said jury so sworn and empannelled as last aforesaid; and the said William Davison was then and there duly given in charge to the said jury, and the said clerk of the Crown did then and there produce divers, to wit, four witnesses for and in behalf of our said lady the Queen, who were then and there duly sworn, and who then and there gave evidence to the said Court and to the said jury so sworn and empannelled and charged with the said William Davison touching the said supposed misdemeanors; and the said William Davison further says, that the said jurors so sworn and empannelled as last aforesaid were then and there, and after they were so charged with the said William Davison as last aforesaid, discharged of him the said William Davison, not by reason of any fatality or misconduct or request of him the

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said William Davison, or for or by reason of any fatality or evident necessity of them the said jurors so sworn and empannelled as aforesaid or of any of them, or for and by reason of any accident or physical or mental infirmity or illness of them the said jurors so sworn, &c. or any of them, or of the said justices of the peace or either of them, or for or by reason of any other sufficient or legal cause whatever; and notwithstanding that the said William Davison did then and there, by William Campbell Sleigh and John Best, of counsel for him the said William Davison, object to and urge before the said William Henry Bodkin, Esq., Joseph Payne, Esq., and others, being justices of the peace for the said county, that such discharge of the said jury was unnecessary and would be illegal, and notwithstanding the non-consent of the said William Davison in that behalf; and this the said William Davison is ready to verify. Wherefore, &c., &c.

Replication: And hereupon Henry Avory, clerk of the said Central Criminal Court, who prosecutes for our said lady the Queen in this behalf, says, that by reason of anything in the said plea of the said William Davison above pleaded in bar our said lady the Queen ought not to be precluded from prosecuting the said indictment against the said William Davison, because he says that the said jurors so empannelled, sworn and charged as aforesaid were sent to and remained in their jury room for a long space of time deliberating upon their verdict; and the said jurors, after the lapse of the said long space of time, came into Court and said they had not agreed upon their verdict, and that they were not likely to agree upon their said verdict; whereupon, all other business before the said justices having come to a conclusion, the said justices then examined into the premises, and in the exercise of their discretion, and in pursuance of law, discharged the said jurors from giving a verdict.

Demurrer.

Sleigh for the prisoner.—The replication is bad, and the prisoner is entitled to his discharge. In Co. Litt. 227 b, it is said, "A jury sworn and charged in case of life or member cannot be discharged by the Court or any other, but they ought to give a verdict." And to the same effect is the passage in the 3rd Inst. 110, "To speak it here once for all, if any person be indicted for treason, or of felony or larceny, and plead not guilty, and thereupon a jury is returned and sworn, their verdict must be heard, and they cannot be discharged." And the rule laid down in 4 Black. Com. 360, is, that a jury cannot be discharged, except in case of necessity, until after verdict. The case of *Conway and Lynch* v. *The Queen* (*a*) is a direct authority in favour of the prisoner. In *Newton's Case* (*b*) it was no doubt held, that, whether or not the Judge was justified in discharging the jury, the discharge was not equivalent to an acquittal, and that the prisoner was properly detained in custody. There Erle, J., says, "Taking the rule to be correctly laid down by Blackstone, the only question appears to be, what is meant by 'necessity' in the exception? I think it means, not an absolute impossibility to avoid discharging the jury, but need in a high degree;" and Coleridge, J., says, "The true question, I think, in all such cases is, whether the whole circumstances of the case were such as to make the act of the Judge in discharging the jury a proper exercise of his judicial discretion." Now here the jury should not have been discharged except for reasons of fatality or of urgent and evident necessity, and it is contended that the facts establishing such necessity should in some way appear upon the record.

The rule of law is clear that "necessity" must exist, and inasmuch as the replication sets forth no facts from which necessity can be inferred, the prisoner is entitled to judgment.—[MARTIN, B.—The Judge has a discretionary power,

(*a*) 7 Irish Law Rep. 149. (*b*) 13 Q. B. 716.

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and has exercised it. Do you say that error will lie from his discretion?]—He also cited *Rex* v. *Cobbett* (*a*); *Whitebread* v. *Fenwick* (*b*); *Rex* v. *Shields* (*c*).

F. H. Lewis, for the Crown, was not heard.

POLLOCK, C.B.—We are all of opinion that it is unnecessary to hear further argument. The question is, whether the plea is sufficient, and Mr. *Sleigh* chiefly relies on the case of *Conway and Lynch* v. *The Queen*. Now, though it has no doubt been laid down in the text books that a jury cannot be discharged except under certain circumstances, it does not appear that prior to that case the improper discharge of a jury was ever made the subject of a plea. I may observe that in that case the Irish Court of Queen's Bench were not unanimous; and therefore, if the necessity arose, I should consider that we were quite at liberty to review it; but it is observable that the case before them was one of felony, the present being one of misdemeanor only. But we are of opinion, generally, that where a Judge has exercised his discretion, that discretion is not to be made the subject of question. It cannot be ground for error, nor can it be traversed before a jury. It seems to me, therefore, that the plea the prisoner has placed upon the record is bad, and that he must yet answer the charge against him.

MARTIN, B.—I think this case might, if necessary, be distinguished from *Conway and Lynch* v. *The Queen*, on the ground that that was a case of felony, and this one of misdemeanor. It is in the highest degree indispensable that Judges should be persons in whose discretion reliance may be placed, and I cannot by possibility see how such a plea as the present can be good. If the arguments on behalf of the prisoner be correct, and the circumstances on

(*a*) 3 Chitty's Burn, 974, tit. "Jurors," 29th edit.

(*b*) 7 Howell's St. Trials, 311.

(*c*) 28 Howell's St Trials, 619, 646, 647.

which that discretion is grounded are to be stated in the pleadings, the difficult question arises, how is it to be tried? Is it to be tried by a jury, or can it in any way be made the subject of appeal? Both tribunals are equally incompetent to deal with such a matter. The fact is, a Judge is bound honestly to exercise his judicial discretion, and against that discretion nothing can be heard.

HILL, J.—I am of the same opinion. I take the rule to be, that the presiding Judge at the trial is the sole arbitrator of all matters before him, and that his discretion is not in any way to be made the subject of review. I adopt the position laid down by Mr. Justice Crompton in his judgment in *Conway and Lynch* v. *The Queen*. He says, "Two men—two Judges—might differ as to the occurrence of a necessity, and as to the course to be taken with a disagreeing jury in a particular case; but still it is the presiding Judge, and he alone, who is to decide (without the interference of a jury or any other authority) whether a case of necessity has arisen or not; this he does of course upon his judicial oath and his personal responsibility. So far, then, it is clear that the Judge has a discretion to exercise; where is the legal limit of his power to be fixed? The prisoner's counsel could not fix it; the Judges in *Kinloch's Case* and Sir M. Foster say it cannot be fixed. I need scarcely add that I cannot fix it." I think this passage contains a correct exposition of the law, that it is applicable to the case before us, and that therefore the plea is bad.

The prisoner was afterwards tried and acquitted.

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Judges' Chambers, coram Byles, J.

SALISBURY *v.* GLADSTONE AND OTHERS.

Vacation.
Bill of exceptions amended by Judge who tried the case.

EJECTMENT on a forfeiture by reason of copyholders having dug clay and made bricks.

The case had been tried by BYLES, J., and bill of exceptions tendered, which, having been duly sealed, had come on to be argued, but turned out to be defective in a certain point, and it was referred to the same Judge, to amend.

T. Jones for the plaintiff.

Baylis for the defendants.

BYLES, J., made the amendment as prayed (*a*).

(*a*) The 222nd section of the C. L. P. Act, 1852, has the largest possible word "proceedings." The Judge who has tried a cause alone has authority to amend the *postea* from his notes: *Daintry* v. *Brocklehurst*, 3 Exch. 691. And as to any points taken at a trial, his note is conclusive; *Bikker* v. *Beeston*, 29 L. J., Exch. 121.

Coram Willes, J.

TURNER *v.* BARNES.

Vacation.
An order directing trial of issues in law before issues in fact, refused, it not appearing that the former would determine all the questions between the parties.

TROVER and detinue.

Pleas: not guilty and not possessed, and a special plea of justification under a deed.

Replication setting out the deed.

Demurrer and rejoinder, that default had been made in payment of money under the deed. Demurrer and issue (*a*).

Summons, on the part of the defendant, for an order directing that the issues in law should be first argued, before the trial of the issues in fact, in order to avoid delay.

Baylis for the plaintiff.

Field for the defendant.

(*a*) C. L. P. Act, 1852, s. 80. See Finlason's Edit. (1860), p. 94.

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WILLES, J. (to the defendant).—Will you abandon the issues in fact?

Field refused to do this; whereupon,

WILLES, J., declined to make the order, adhering to the principle of *Burdett* v. *Coleman* (*a*), where the Court *stayed* second and third actions; the demurrer in the first raising the *whole question* between the parties.

(*a*) 13 East, 27.

Coram Byles, J.

CHAMBERLAIN *v.* STREATHER (*a*).

The *nisi prius* record ordered to be amended so as to make it accord with the pleadings delivered.

THIS was an action brought against a cab proprietor by a cabman, for damaging his licence.

The declaration alleged that the plaintiff had been employed by the defendant to act as driver of a cab of the defendant's, and the plaintiff thereupon, in pursuance of the provisions of the statute in that behalf, delivered his licence to the defendant, to be by him retained while the plaintiff remained in his service; and that, while the said licence was in the defendant's possession, the defendant made certain signs, marks and writings with coloured ink upon the said licence, intending thereby to represent the plaintiff as an unfit and improper person to act as a driver of cabs, whereby, &c.

In the issue delivered, and the record of the cause entered for trial, it was found that the following words were introduced in the statement of grievances in the declaration: "And wrongfully and unjustly damaged the said licence, intending thereby to render the same wholly useless and of no effect to the plaintiff."

A summons was taken out on behalf of the plaintiff, calling on the defendant to show cause why the issue and record should not be amended by striking out the words which had been added.

(*a*) Reported by F. H. Gibbons, Esq.

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Mathew, in support of the summons, referred to *Bust* v. *Hancock* (*a*) and *Suker* v. *Neale* (*b*).

BYLES, J., made the order, the costs of the amendment to be defendant's costs in the cause in any event, and expressed a doubt whether, if the cause had been tried and a verdict had for the plaintiff, the proceedings might not have been set aside, and the plaintiff compelled to pay the costs of the trial.

(*a*) *Ante*, p. 57. (*b*) 1 Exch. 468.

Coram Wilde, B.

Re ELIZABETH DALEY.

Vacation. Habeas corpus granted on the application of a sister of an orphan girl under fourteen, to remove her from an asylum where the applicant was denied access to her.

DAY applied (*a*) for a writ of *habeas corpus* to be directed to the matron and secretary of the Refuge for Houseless and Destitute Children, and Ragged and Industrial Schools, 19, Broad Street, Bloomsbury, commanding them to produce before him Elizabeth Daley, with the cause of her detention in the said refuge.

He applied upon an affidavit of the elder sister of Elizabeth Daley, and of her solicitor (*b*).

The affidavit of the sister stated:—That she was of the age of twenty-four years, and that she had lived in her present place of service for fourteen months last past, and that her sister Elizabeth Daley was then in the sixteenth

(*a*) In Vacation, such a motion at common law can be made before a single Judge; *vide Brown* v. *Gisborne*, 2 D., N. S. 963.

(*b*) Where access is denied to a person alleged to be detained, so that there are no instructions from the prisoner, the application may be made by any near friend or relative, on an affidavit setting forth the reasons for its being so made; *vide Re Thompson*, Exch., M. T. 1860. It has indeed been held that the application could not be made by a mere stranger, as where it was made by the secretary of the Lunatics' Friend Society. See *Re Fitzgerald*, 2 C. L. R. 180. It should seem that in such cases it should be made by the Attorney-General, representing the Crown in its capacity as *parens patriæ*, as in the case of infants, or of charities where the public are interested.

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year of her age. That her father died in or about the year 1850, leaving her mother and four children of him and her said mother him surviving, and that her mother died in the year 1851, leaving the said four children her surviving, and that her said father and mother lived and died members of the Roman Catholic Church, and brought up their children in the same faith. That, upon the death of deponent's mother, the younger sister, Elizabeth Daley, was in consequence of her illness taken into the infirmary attached to the Marylebone Workhouse, and remained there about eighteen months, when she was discharged therefrom, and from that time deponent took charge of her said sister, and, with the assistance of another sister and of friends, supported her, and educated her in the faith of her father and mother, until about two years and a half ago, when, through temporary distress, deponent was compelled to place her said younger sister, Elizabeth Daley, then of the age of thirteen years, in St. Margaret's Workhouse, Westminster, and that she then stated to the officers of the said workhouse that it was only on account of temporary difficulties that she was compelled to place her in the said workhouse, and that she should shortly remove her therefrom, to which no objection was made. That her said sister was almost immediately thereafter removed into the workhouse of the parish of St. Marylebone. That, about two months after so placing her said sister in St. Margaret's Workhouse as aforesaid, deponent applied to the Board of Guardians of the St. Marylebone Workhouse for leave to remove her, having in the meantime found a school where she would place her, and where she would be properly maintained and educated in her own religion, of all which deponent then informed the said parties. This application was refused, except upon the terms of deponent's procuring the guarantee of some approved person that her said sister should not again become chargeable to the parish while she was under a certain age. That deponent was unable

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to procure any person to become so bound, until about a year ago, when a person offered to take her said sister and apprentice her to her trade of lacemaker, which offer deponent then accepted, and immediately applied again to the said board of guardians for leave to remove her said sister. Deponent then found that her said sister had been removed by some person or persons, to her unknown, from the said workhouse, and had been placed by him or them at some school in the Marylebone Road. Deponent immediately, accompanied by the said —— (the person who was willing to apprentice her), applied at the said school for leave to remove her said sister for the purpose of apprenticeship as aforesaid, but the matron of the said school refused to allow deponent even to see her said sister, and refused to say when she would be discharged from the said school. That deponent went again to the said school about three months after the last-mentioned application, but found that her said sister had been removed from the said Marylebone Road, and that although she made many inquiries, and caused others to be made, she was wholly unable to discover to what place or by whom she had been so again removed. That about the commencement of this present month of October, having received information which induced deponent to believe that an institution called the "Refuge for Houseless and Destitute Children, and Ragged and Industrial Schools," situate at 19, Broad Street, Bloomsbury, was connected with the said school in the Marylebone Road, she, on the 2nd inst., called at the said institution, when the matron informed deponent that a girl named Daley had been sent there from Tonbridge Wells, to be shortly shipped to Tasmania; that deponent then saw the said girl in the presence of the said matron, and found that the said girl was her said sister Elizabeth, and on deponent asking her why she was going abroad, she stated that she thought her family had given her up,

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and that she might as well go as stay; but now, that she had seen deponent, she did not wish to go abroad. The same evening deponent saw her said sister again in the presence of the said matron and of a friend of deponent's, who also asked the said Elizabeth Daley why she was going away, and that she replied "that she had been much persuaded by the matron at Tonbridge Wells, but that she had always said she would not go without seeing her sister." Deponent then asked her said sister whether she would wish to come with her, when she replied, "I should only be too happy." That her said sister then told deponent that, although a Catholic, she was compelled to attend the services of the Established Church. That, having reason to fear after the difficulty that deponent had had in finding her sister, and the obstacles that had been put in the way of her removing her from the said workhouse and from the said schools in the Marylebone Road, that her said sister might be again put out of the way and removed to Tasmania, deponent then, under the advice of friends, instructed her solicitors to take such measures as would enable her said sister to leave the said refuge if she thought fit. That deponent was in a position to support her said sister until she could obtain a situation for her, until which time she had the leave of her master for her said sister to reside with her at his house. That deponent verily believed that her said sister was detained in the said refuge against her will, and that she made the application for a *habeas* on behalf of the said Elizabeth Daley.

The affidavit of the solicitor stated, that on the 11th day of October instant, he was informed of the circumstances under which Elizabeth Daley was detained in the refuge, and was instructed to make application for her to be allowed to leave if she thought fit. That accordingly he, on the same day, called at the said refuge, and, upon asking to see the matron thereof, he saw instead a person who

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was represented to be the under-teacher, and after explaining to her the object of his application, and learning from her that the said Elizabeth Daley had been sent to the said refuge with the object of being shipped to Tasmania, he was referred by her to Mr. William Williams, the secretary of the said refuge, living at No. 10, Hart Street, Bloomsbury Square. That he, on the same day, called on the said William Williams, and stated that the elder sister, after seeking for her younger sister, the said Elizabeth Daley, for a considerable time, had only a few days previously discovered her to be in the said refuge, and on the eve of shipment for Tasmania; and that the said elder sister was very anxious for the said Elizabeth Daley to be allowed to leave the said refuge if she so thought fit, and that deponent was informed that the said Elizabeth Daley was also anxious to do so. That the said William Williams replied that the said elder sister had taken no interest in the said Elizabeth Daley, and that deponent's information as to the wishes of the latter was not correct. That deponent explained to the said William Williams the reason of the said elder sister not having been able to discover the said Elizabeth Daley, and that he requested to be allowed to have an opportunity of seeing the said Elizabeth Daley for the purpose of ascertaining from her what were her wishes; but the said William Williams refused the application. But, on deponent's subsequently alluding to proceedings being taken in this Court, and saying, "Now, let me clearly understand, you distinctly refuse to allow the girl's elder sister to see her in my presence, to ascertain whether it is her wish to remain in the refuge or not," the said William Williams stated that the only visiting day was the first Monday in the month, and that the said Elizabeth Daley could not be seen at any other time.

Upon these affidavits the Judge immediately directed a writ of *habeas corpus* to issue, and the girl to be produced

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before him on the following Tuesday, the 16th of October (*a*).

(*a*) The next day, the 13th inst., between two and three P.M., the writ was served on the matron and secretary of the refuge, and within an hour afterwards it was obeyed, and the girl was at the residence of her sister. The Court of Queen's Bench, in Mich. T., 1860, decided, with reference to the Statute of Philip and Mary as to the abduction of girls under sixteen, that sixteen, and not fourteen, as in the case of boys, was the age at which a girl had a right to choose her residence. This question could not have arisen in this case even had the writ been contested, for the girl was under fourteen, and under that age, as established *In re Race*, 26 L. J., Q. B. 169, a boy or girl is not *sui juris* even as regards personal liberty, and is *not* entitled to choose a residence. Supposing the girl to be under sixteen and the parents dead, although the statute of Philip only applies to parents, it is presumed that, even if its equity did not apply to near relatives *in loco parentis*, so far as regards the right to custody, the Court would never grant a writ to remove a minor into *improper* custody.

In re PRICE.

Vacation.

A husband being, until guilty of cruelty, or until judicial separation, entitled to the custody of his wife, and to detain her if she desires improperly to leave him, a *habeas corpus* obtained on her behalf against him, will be discharged in such a case.

HABEAS CORPUS obtained on behalf of a wife against her husband, directing him to produce her and return the cause of his detaining her.

The affidavits in support of the application made by friends of hers (*a*), stated that the wife of her own free will, and with the consent of her husband, had become an inmate in the "Agapemone" (*b*), that he had seceded from that institution and had removed her from it against her will, and that she desired to return to it, that he had removed her by stratagem and detained her by force in his own house, and that in fact she was kept imprisoned.

Tindal Atkinson, on behalf of the husband, read an affidavit describing the institution mentioned, and denying

(*a*) See as to this, the note to the previous case, and *Re Thompson*, Exch., M. T. 1860.

(*b*) See as to this institution, the case of *Thomas* v. *Roberts*, 14 Jur. 639, and *Nottidge* v. *Prince*, 29 L. J., Chan. 857.

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any cruelty (*a*) and any restraint or confinement beyond what was necessary to prevent the wife from returning to the institution mentioned, and contended that the husband had a right to have his wife in his care and custody.

On the other hand it was contended, that the wife, being of full age, was entitled to her personal liberty and should be allowed her own election to depart from or remain with her husband (*b*), but

WILDE, B.—That would be so if she were in *improper* custody (*c*), but *primâ facie*, the proper residence of a wife is with her husband. No cruelty is shown, if there were, probably no Court would force her return to him (*d*). The Divorce and Matrimonial Court Act (*e*) provides her with a remedy (*f*). This is not an application by the husband to obtain the custody of his wife. He has it: and, as there is no case of cruelty and the conjugal rights remain unaffected, he is entitled to it. And if he believes, as is assigned, that she intends to leave him to reside in an improper place, he has a right to restrain her. She must, therefore, return to her husband.

Writ discharged (*g*).

(*a*) As to which, *vide Neeld* v. *Neeld*, 4 Haggard's Ecc. Rep. 263.

(*b*) *Rex* v. *Greenhill*, 4 Ad. & E. 634.

(*c*) *Vide supra*, n. (*b*).

(*d*) *Vide supra*, n. (*b*).

(*e*) 20 & 21 Vict. c. 85, amended by 21 & 22 Vict. c. 108.

(*f*) See sect. 16 of the former act—"any wife may obtain judicial separation for cruelty," and judicial separation gives her the *status* of a feme sole. See *Tempany* v. *Hakewill*, 1 Fost. & Fin. 438; *Thomas* v. *Head*, 2 Fost. & Fin. 88

(*g*) For a report of this very useful case the profession are indebted to Mr. Kemp, of the Home Circuit.

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Michaelmas Term.

RHODES *v.* BRYANT.

SUMMONS to set aside a judgment and execution.

Where appearance is entered after due time, though before judgment signed, there should be notice of it.

The writ in this action issued, specially indorsed, on the 3rd September, the judgment was signed on the 12th, after an appearance entered on the 11th, but of which there had been no notice to the plaintiff (*a*). Execution had issued on the 19th.

On the 2nd October there had been a summons to set aside judgment and execution. There was a contest of testimony on the affidavits, as to whether the writ was served on the day on which it issued, viz. the 3rd, or on the following day, the 4th.

The learned Judge decided on the affidavits as to that question (*b*), determined it in favour of the defendant, and set aside the judgment as irregular, the time for appearance, that is, eight days after the day he considered the day of service (i. e. the 4th) not having elapsed.

(*a*) The C. L. P. Act, 1852, s. 27:—"In case of non-appearance by the defendant, where the writ of summons is indorsed in the special form . . . . it shall be lawful for the plaintiff, on filing an affidavit of personal service, *or* a Judge's order for leave to proceed . . . *and* a copy of the writ of summons [on which, by sect. 15, the person serving the writ is required to indorse the day of the service], at once to sign final judgment . . . . and the plaintiff may, upon such judgment, issue execution at the expiration of eight days from the last day for appearance [reckoned exclusively of the first day and inclusively of the last (Rule 174, H. T., 1853)], and not before." The sect. 29:—"The defendant may appear at any time before judgment, and *if he appear after the time specified* . . . he shall, *after notice* of such appearance to the plaintiff or his attorney, be in the *same* position as to pleadings and other proceedings as if he had appeared in time [that is, before the time specified had expired; but] provided, that appearing after the time appointed by the writ, shall not be entitled to any further time for pleading or any other proceeding than if he had appeared within such time." See also s. 32.

(*b*) No application was made by the plaintiff to offer the defendant the alternative either of an issue of fact as to the time of service, under sect. 40 of the C. L P. Act, 1852, or an *oral* examination before a Judge, under sect. 46 of the C. L. P. Act, 1854. And on an application to the Court of Exchequer to set

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Afterwards, the matter having been again referred to the same Judge, on an application to the Court, it was now reheard on another similar summons (*a*).

It was urged, on the part of the defendant, that the judgment was irregular, having been after appearance.

It was contended on the part of the plaintiff that this did not matter, as there had been no *notice* of the appearance (*b*).

The learned Judge having consulted WILLES, J., said he thought that notice of appearance was necessary in the case (*c*), but he confirmed his order setting aside the judgment on the facts, restraining an action which had been brought.

Patchett for the plaintiff.

Pearce for the defendant.

aside the order, the Court threw out that one or other of these courses might have been taken had it been suggested at Chambers; but as there were additional affidavits, *not* of new matter unknown at Chambers, the Court refused to entertain it, and referred it back to Chambers; *vide supra*. See *Mosley* v. *Blake*, 28 L. J., Exch. 35.

(*a*) It is to be observed, that it is only by an issue of fact that the matter of fact as to the regularity of the judgment could be determined by a jury; for, if the judgment were *set aside*, it could not be tried in the action of trespass, for the judgment would no longer exist. Hence it is conceived that the issue of fact clause in the act of 1852 is very important in cases of this kind, affording the defendant a fair means of trying the question, which if he declines doing, the value of his affidavits may be doubted; or if the matter be trivial, there may be a more summary determination, on an oral examination of the parties. The trial of such a question on affidavit is, it should seem, very unsatisfactory.

(*b*) The appearance book is in the same office as that in which the judgment is signed, so that whether or not there is actual notice, there must needs be knowledge, or the means of present knowledge, of appearance; and hence it is that, in order to sign judgment, an affidavit of non-appearance is required; and even if appearance is nothing without *actual* notice of it, rule 161, H. T. 1853, requiring notices to be in *writing*, only applies to notices required by those *rules*, or the *practice* of the Court, *i. e.*, *unwritten*; *Begg* v. *Forbes*, 13 C. B. 614.

(*c*) To give time to plead; *vide ante*.

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In re EMILY SUTTOR.

Vacation.

Though a father residing abroad has the right to direct the custody of his child in this country, yet if it appears that he has under some misapprehension directed her to be in custody of a person, not a relative, the child will not, pending an application to him for direction, be removed from the care of her near relatives.

HABEAS CORPUS. The writ had been obtained against one Routh, by an attorney, on behalf of one Charlotte Thornton, who professed to have been entrusted with the care and custody of Emily Suttor by her mother, now deceased, and also by written authority from her father, in Australia.

The affidavit of Charlotte Thornton (confirmed by R.) stated, that she had resided with the mother and daughter as companion and housekeeper, that the mother had removed the child from the family of Mr. Routh, (who had married her aunt,) in order to place her at school; that in 1859, the mother's relatives alleged that she was insane, and desired to remove the child from her control and place her herself under proper care. That in consequence of this the father was written to, who had for some years resided in Australia, and that in answer to this letter the mother, in August, 1859, received from him a paper, which was set out in terms, and purported to appoint the deponent to be his lawful agent, to act for him during his absence or until he should otherwise in writing direct, for the purposes stated "that is to say, in case of the death or incapacity of my wife, I authorize and request the said Charlotte Thornton to take possession of, and retain until my arrival in England, or until otherwise directed by me, for my benefit and for the use and benefit of my daughter Emily now at school; all goods, &c. my wife may have, and also, if possible, to retain possession in my name of the cottage (in which the mother lived), and to keep it as a home, &c. for my daughter during her vacation; and I further authorize and request the said C. T., in case of the death of my wife, to take charge of and attend to the comfort and well-being of my daughter during her vacations; but during the terms of tuition I desire that she be under

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the care of (her school-mistress); and further, I desire the said C. T., in case of the death or incapacity of my wife before I arrive in England, to write immediately to me for further instructions. And in case of my death I appoint my brother (of New South Wales) to be the guardian of my daughter."

It appeared from the affidavit, however, that C. Thornton wrote the mother's letters, she herself being paralysed, and it did not appear what were the representations or communications in consequence of which the above paper had been sent.

That afterwards the child went to a day school, sleeping at home, under the care of her mother and the deponent, until the death of the mother on the 19th November. That before her death, while sinking under paralysis, she made a declaration, attested by deponent and two other witnesses, to the effect that the above paper expressed her wishes; that the mother's sister, Mrs. Routh, had removed the child, and that her husband, Mr. Routh, detained her and refused to deliver her up.

Upon this affidavit, confirmed by one of the attorney, the writ had issued, dated December 5th, directed to Mr. Routh, commanding him to have before the Chief Justice or "such other Judge as may be at Chambers, immediately after the receipt of the writ, the body of Emily Suttor being detained under your custody as is said, together with the day and cause of her being taken and detained by whatever name she may be called therein, to undergo and remove all such matters and things as our Chief Justice or other Judge shall there and then consider of and concerning her in this behalf."

The return dated the 10th December was as follows:— "In obedience to this writ, hereunto annexed, to me directed I say, that the said Emily Suttor, upon the death of her mother and in the absence of her father beyond the seas, accompanied of her own free will her aunt, who is

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my wife, and who is one of the nearest relatives of the said Emily now in England, and has thence hitherto of her own free will resided with the said Sarah Routh, and has not been and is not detained by her against her will (*a*), and I have now before one of the Judges of this Court at the Chambers, &c. the body of the said Emily Suttor ready to abide the order of the Court."

This return was supported by strong affidavits, setting forth that Charlotte Thornton was a mere nurse, and that the relatives of the child in England had never heard of the paper set forth in her affidavit until after the mother's death; that the child under her care would not be in society suited to her sphere in life; that the father, if he ever wrote the paper, must have written it under some misrepresentations of the nurse, who wrote the letters of the mother (she being paralysed as already mentioned); that he had been written to in order to ascertain his wishes; that he could know nothing of the nurse, who had been engaged in England in that capacity since the mother had left him in Australia; that the mother, before her death, had fallen entirely under the influence of the nurse, but that some months previously she had expressed a wish that in case of her death the child should reside with her aunt; that the relatives never heard of the declaration of her wishes sworn to by the nurse, and that it was believed when the father understood the matter he would not wish his daughter to be under the care of the nurse, and that the child was willing to remain with her aunt.

Upon these affidavits, the matter having been fully argued by

Keane, on behalf of the applicant, the nurse, and

Day, on the part of the defendant, the uncle.

WIGHTMAN, J., having ascertained by his own exami-

(*a*) This would not have been sufficient but for what followed, the girl being a minor and not *sui juris*; *Re Race*, 26 L. J., Q. B. 169.

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nation of her (*a*), the wish of the child to remain with her uncle and aunt, said, he never should have ordered the writ to issue if he had known what now appeared, that the applicant was not as had been represented, companion and housekeeper, but a mere nurse, of whom the father knew nothing of his own knowledge. He had supposed she was an old family housekeeper in whom the father from long knowledge had confided, and to whom he had intrusted the care of his child, whereas it appeared she was a mere nurse engaged to attend the paralysed mother during the last few years of her life. It appeared far more proper that the child should remain under the care of her nearest relatives, in a society suited to her birth and position in life, pending the application to her father (*b*).

(*a*) The counsel not objecting.
(*b*) There being an undertaking not to remove her out of the jurisdiction.

Coram Wightman, J.

JENKINS *v.* DAVIS.

Where it is alleged that a landlord's title has expired, *quære*, whether title is in question, so as to warrant a prohibition; but, pending proceedings by him in Chancery, to prolong his title, proceedings at law restrained, so as to allow of an application for an injunction.

SUMMONS for prohibition to the Carmarthen County Court to restrain proceedings upon a plaint, on the ground that title came into question.

Plaint (issued 26th October, 1860) to recover premises under 19 & 20 Vict. c. 108, s. 50.

It appeared upon the affidavits that the plaintiff was tenant from year to year to one Howell, from whom he had received notice to quit, expiring at Michaelmas; and that, on his refusal, an ejectment was commenced against him and his under-tenants, including the defendant, in the Superior Court, and which the plaintiff was defending as landlord. It also appeared that the plaintiff refused to quit, upon the ground that he was entitled to a long lease under an alleged agreement from Howell (which, however, Howell denied), and had filed a bill in Chancery against

him for specific performance; meanwhile he sued out this plaint.

Murray having on a former day obtained a summons *nisi* for a prohibition, cause was now shown.

No counsel for plaintiff.

Murray cited *Rankin* v. *Rankin* (*a*), and argued that according to all the cases, when the tenant objects that his landlord's title has expired, title is in question.

WIGHTMAN, J.—The defendant came in under the plaintiff's, why does he not go out?

Murray.—He is not bound to give possession if his landlord's title has expired. If ejectment were brought in the Superior Court this would be a defence.

WIGHTMAN, J., without deciding whether, under the circumstances, title came in question, stated, that if there was any ground for saying that the plaintiff was entitled in equity to be considered as landlord, he might apply for an injunction to restrain the ejectment in the Superior Court; and adjourned the summons until such application should be made; meanwhile staying all proceedings in the plaint (*b*).

(*a*) 3 E. & B. 399.

(*b*) By the C. L. P. Act, 1852, s. 226 (Finlason's C. L. P. Acts, Edit. 1860, p. 160), in case any action, suit or proceeding in any Court of Law .... shall be commenced, tried or prosecuted in disobedience of and contrary to any writ of injunction, rule or order of either of the *Superior* Courts of Law or Equity, or of any Judge thereof, in any other Court than that by or in which such injunction may have been issued or rule or order made upon the production to any such other Court, or Judge thereof, of such writ, &c., the said Court in which such action, &c. may be prosecuted, or any Judge thereof, shall stay all further proceedings contrary to such writ, &c., &c. This only applies where an injunction *has* issued, and the mere fact that proceedings are pending in equity, involving the same matter, is not a ground for staying proceedings at law (*Pearse* v. *Robins*, 26 L. J., Exch. 183). But on the other hand, it is enough that an order has been made virtually restraining *any* action, even although an injunction has not issued in the par-

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ticular action (*Cobbett* v. *Ludlam*, 11 Exch. 446); and it is always in the discretion of the Court to stay proceedings contrary to equity, in the sense in which the Courts of Law regard it, with reference to their own proceedings, as where an action is stayed until the plaintiff, serving as executor, produces probate; 14 Com. B. Rep. 421.

Coram Erle, C. J.

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Vacation.

A return to a writ of *habeas corpus*, that a child under fourteen "is not *detained* by, or in the custody, power or possession, or under the care or control of the defendant, or any person employed by him, *held* insufficient. If a return, which on the face of it is ambiguous, is not fortified by affidavit, clearing up all doubt, it will be held evasive and bad.

A case of cruelty should be raised on the return, and not brought in by affidavit merely to uphold a return which is evasive and bad.

HABEAS CORPUS.

A writ had issued pursuant to 56 Geo. 3, c. 100, s. 2, on the last day of last term, and made returnable at chambers. It was directed to the reverend defendant, the superintendent of the Roman Catholic School where the child Mary Ann M'Donnell was last seen, and Mary M'Carthy, the schoolmistress; and commanded them to bring the body of the child Mary Ann M'Donnell, who was between twelve and thirteen years of age, into Court. The affidavit of the father, upon which the writ was granted, was as follows:—

I, James M'Donnell, for myself, say that on the 12th day of March, 1846, I was married according to the rites of the Roman Catholic Church, at St. Mary's Church, Horseferry Road, in the city of Westminster, to Bridget Cavanagh, who died on the 27th day of October, 1857, and there were issue of such marriage five children, four of whom are now living, the eldest of whom, named Mary Ann M'Donnell, was born on the 1st day of February, 1847. I, James M'Donnell, further say that my deceased wife Bridget was, up to the time of her death, nominally of the Roman Catholic religion, but seldom attended any place of worship, and that, until three years since, I was of the same religion, but I am no longer a member of the Church of Rome; that during the lifetime of my late wife Bridget, the said Mary Ann M'Donnell was, with the consent of my said wife, sent to a school in Horseferry Road attached to a Wesleyan Chapel, and subsequently, in consequence of my changing my abode, she was, with the like consent, from July, 1855, to the beginning of 1858, sent to a school in Castle Lane, Westminster, attached to the Westminster Independent Chapel, Castle Lane aforesaid; that shortly after the death of my said wife Bridget, my mother came to take charge of my house and children, and she, with my consent, sent the said Mary Ann M'Donnell to a Roman Catholic School in York Street, Westminster, where she at-

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tended up to the end of November, 1858, but, in consequence of disapproving the associates made by the said Mary Ann M'Donnell at the last-mentioned school, I, at the latter end of January, 1859, sent the same Mary Ann M'Donnell again to the school in Castle Lane, attached to the said Westminster Independent Chapel. I, James M'Donnell, further say that shortly after I removed the said Mary Ann M'Donnell from the school in York Street to the school in Castle Lane aforesaid, the Rev. Joseph William Roberts, a Roman Catholic priest, and superintendent of the said school in York Street, called upon me on three different occasions, with the view of obtaining my consent to the said Mary Ann M'Donnell continuing her attendance at the said York Street School, but which I declined to give. And we, the said James M'Donnell and Ann M'Donnell, for ourselves say, that we were married at St. Martin's Church, Strand, in the county of Middlesex, on the 25th day of October, 1858. We say that, on the morning of the 4th day of April, 1859, the said M. A. M'Donnell was sent to the said school in Castle Lane, attached to the Westminster Independent Chapel, but, on making inquiry, we found that she had not been there, but, on the contrary, had been to the said Roman Catholic School in York Street aforesaid. I, the said Ann M'Donnell, for myself say that, on Tuesday the 5th day of April, 1859, finding that the said Mary Ann M'Donnell was again at the said Roman Catholic School, I went there and saw her, and the said Rev. Joseph William Roberts, and Mrs. M'Carthy the schoolmistress, and demanded that the said Mary Ann M'Donnell should be given into my charge, but the said Rev. Joseph William Roberts declined to give her to me, and desired me to leave the premises, but said he would deliver her to her father. And I, the said James M'Donnell, for myself say, that on the 5th day of April, being informed by my said wife of what had taken place, I went to the said school in York Street, but I could not find either the said Rev. Joseph William Roberts or the said Mary Ann M'Donnell, although I searched the school and rooms adjoining thereto; and that on the following day, Wednesday, the 6th day of April, I went to the residence of the said Rev. Joseph William Roberts, for the purpose of demanding my said child, but he declined to see me, and on the following Friday, the 8th day of April, I saw the said Rev. Joseph William Roberts at 25, Palace Street, Westminster, adjoining the Roman Catholic Chapel there, when he informed me he knew nothing about my daughter, the said Mary Ann M'Donnell, and if he did he would not tell me. I, James M'Donnell, further say that, on the 28th day of April last I received the paper writing now produced to me, marked "A," which I believe to be in the handwriting of my daughter, the said Mary Ann M'Donnell, but not her composition.

The return was as follows:—

William Walter Roberts, clerk, and Mary M'Carthy, the persons to whom the annexed writ is directed (the said

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William Walter Roberts being named therein by mistake Joseph William Roberts, and the said Mary M'Carthy being named therein M'Carthy, without any Christian name), do severally hereby humbly certify and return to the Court of our lady the Queen, before the Queen herself, that the said Mary Ann M'Donnell, in the said writ mentioned, was at a school in York Street, Westminster, in the county of Middlesex, of which the said William Walter Roberts and Mary M'Carthy have the care and management, on the 5th day of April last, the said Mary Ann M'Donnell having come to the said school in the morning of that day of her own accord, without having been taken or sent to the said school, either by the said William Walter Roberts or by the said Mary M'Carthy, or by any person employed or authorized by them or either of them, and without the said Mary Ann M'Donnell being in any manner, before she came to the said school, in the custody or under the control either of the said William Walter Roberts or of the said Mary M'Carthy, or of any person employed or authorized by them or either of them, and that the said Mary M'Donnell remained in the said school after she had so come there as aforesaid, until about half-past twelve o'clock on the said 5th day of April, having previously refused to go home to the house of her father, James M'Donnell, although advised and at liberty so to do. That the said Mary Ann M'Donnell left the said school at about half-past twelve, or rather later, on the said 5th day of April, of her own accord, and *not in the custody, power or possession, or under the control*, either of the said William Walter Roberts or of the said Mary M'Carthy, or of any person employed by them or either of them, or of any person acting under the authority or direction of them or either of them; and neither the said William Walter Roberts nor the said Mary M'Carthy ever presented any hindrance or impediment, nor used any threat or persuasion, or held out any inducement to prevent the said Mary Ann M'Donnell

from returning home to the house of her said father, but the said Mary Ann M'Donnell was perfectly free from all restraint, and might, if she had chosen, have returned to her said father's house from the said school, or might have been taken therefrom by her said father. And that the said Mary Ann M'Donnell was not at any time after she so left the said school as aforesaid, nor was she at the time either of the issuing or of the serving of the said writ, *nor has she been at any time since, nor is she now in any manner detained* (*a*) *by or in their custody, power or possession*, or under the care, control or authority either of the said William Walter Roberts or of the said Mary M'Carthy, or of any person employed by them or either of them, or acting under the control or authority of them or either of them. Wherefore the said William Walter Roberts and the said Mary M'Carthy cannot, nor can either of them, have the body of the said Mary Ann M'Donnell before the said Chief Justice, or other Justices as aforesaid, according to the exigency of the said writ.

Dated this 16th day of May, in the year of our Lord 1859.

WILLIAM W. ROBERTS.
MARY M'CARTHY.

In reply to the charge of cruelty, the following affidavits had been filed:—

I, said Ann M'Donnell, say that I have never beaten said Mary Ann M'Donnell, or, excepting on one occasion, knew her father, my husband, the said James M'Donnell, to do so; but, on the contrary, both myself and my said husband treated her with kindness and affection; and I say that, up to the middle of March, 1859, she was a very good girl, and appeared anxious to please her father and me, and any directions given to her by her father or me were cheerfully obeyed by her; but, about the middle of said month of March, a great change took place in her behaviour, which at the time I could not account for, but now I verily believe the same to have been caused by the influence of the said William

(*a*) This word over-rides the entire sentence, and merely denies a compulsory detention, which would be sufficient in the case of an adult, but not in the case of a child, who is not *sui juris*; *vide Re Race*, 26 L. J., Q. B. 169; *et vide ante*, p. 263, n. (*a*).

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Walter Roberts, for I say that, on one occasion on my requesting her to do some particular act, she declined, stating that I was not her mother, and had nothing to do with her, being the identical words which were addressed to me by the said W. W. Roberts on a subsequent occasion. We, said Ann M'Donnell and Emily Williams, say that, on Tuesday the 5th of April, between the hours of eleven and twelve o'clock, we went to the Roman Catholic School in York Street, Westminster, and the deponent Ann M'Donnell, in the presence of above-named Mary M'Carthy and W. W. Roberts, requested said Mary Ann M'Donnell to return to her home, but she declined to do so, and, on our taking hold of her for the purpose of making her come home, said W. W. Roberts interfered, and said, "These are my premises; I desire yon to leave them; if not, I shall send for the police; you shall not take her away, but I will give her up to her father, if he comes." And, addressing the deponent, Ann M'Donnell, said, "You are not her mother, and have nothing to do with her;" and we verily believe that, had not the said W. W. Roberts interfered, we should have taken the said Mary Ann M'Donnell home to her father. I, said Ann M'Donnell, say that I then left the said premises and went for my husband, the said James M'Donnell. I, said Emily Williams, say that I left said school with said Emily M'Donnell, but remained opposite to said school in the street, until said James M'Donnell came to me, when he went into the school with me, and searched the school and adjoining rooms, but could not find his daughter, said Mary Ann M'Donnell. And I say that said Mary Ann M'Donnell must have been secreted somewhere in said premises, for I never left the spot immediately opposite the street door of the said school, and said Mary Ann M'Donnell never quitted the same from the time I left her in the school until her father's arrival, at about a quarter past one o'clock. And I, said Emily Williams, further say, that in the course of my endeavours to persuade the said Mary Ann M'Donnell to return home, I promised her that her father should not whip her again, when she replied that she did not care for his whippings; he had not hurt her. And I, said Emily Williams, for myself, say that I have resided in the same house with the said James M'Donnell, and Ann his wife, and the said Mary Ann M'Donnell, for fourteen weeks and upwards, and during that time the said Mary Ann M'Donnell was treated with the greatest kindness, and, excepting on the 4th of April, 1859, I never knew either her father, or his wife, the said Ann M Donnell, to beat, or in any manner ill-treat the said Mary Ann M'Donnell, but, on the contrary, treated her with great kindness and affection. And I, said Ann M'Donnell, for myself, further say that, on the 7th of April, 1859, about eleven o'clock in the forenoon, I saw said Mary M'Carthy at the Roman Catholic School in York Street aforesaid, and begged her to tell me where said Mary Ann M'Donnell was, but she said she could not say where she was, but she was not detained against her will.

I, James M'Donnell say, that I never beat the above-named Mary Ann M'Donnell until the 4th day of April, 1859, when I beat her in conse-

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quence of her having, against my express desire, gone to the Roman Catholic School, in York Street, Westminster, although I had desired her to go to the school attached to the Westminster Independent Chapel, in Castle Lane, Westminster. On the said 4th day of April, I gave her five or six stripes with a piece of string which happened to be in the room at the time, and I say, that such punishment was extremely mild, and not more than I should have inflicted in case of need upon her brother, a child between four and five years of age; and although I punished the said Mary Ann M'Donnell for going to the said school in York Street, as hereinbefore mentioned, between the hours of one and two o'clock in the afternoon of the said 4th day of April, and desired her not to go again, she was induced to go, and did go the same afternoon, and did not return to her home until nine o'clock in the evening. That up to about the middle of the month of March, 1859, there was no occasion for me to, nor did I, find fault with the conduct or behaviour of my daughter, the said Mary Ann M'Donnell, she being a very good girl, and, until the last-mentioned time, was always ready and willing to do anything I requested her, and she always appeared, and I verily believe did entertain a strong feeling of affection for me, as I did, and still do, for her; but, after the middle of the said month of March, I discovered a most marked alteration in her conduct, but was unable to discover the cause. That the above-named William Walter Roberts on three several occasions called upon me, and requested me to allow my daughter, the said Mary Ann M'Donnell, to return to the said school in York Street, Westminster, aforesaid, the last of such occasions being on Wednesday, the 16th day of March, 1859, when, as on the previous occasions, I declined to allow her so to do. He told me that I was bringing her up in the wrong religion, and that I should be punished hereafter for it, and that if I allowed her to attend his school he would push her forward, and make a pupil teacher of her; and I say that my daughter, Mary Ann M'Donnell, was aware of the visits of the said William Walter Roberts, and of my refusal to allow her to attend the said school. That, on Monday, the 28th day of March, 1859, my daughter, the said Mary Ann M'Donnell, was sent, as she had been from the end of the previous January, to the school attached to the Westminster Independent Chapel in Castle Lane aforesaid, but instead of going to the said school as directed by me, she, without my knowledge, and contrary to my desire, as expressed to the said William Walter Roberts, and of which desire she was aware, went to the said Roman Catholic School in York Street aforesaid, and took with her her brother, between four and five years of age, and continued attending such school from Monday, the 28th, up to the middle of the day of Thursday, the 31st day of the said month of March, when I first discovered that she was attending at the said Roman Catholic School. That on Tuesday, the 5th day of April, 1859, about eight o'clock in the evening, my daughter not having returned home, and having heard, as stated in my former affidavit, that she was at the said Roman Catholic School in York Street aforesaid,

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I went to the said school and saw Mrs. Bonner, who had the care of it, and informed her that my daughter Mary Ann had not been home, and I had heard that she was with her, when she informed me that Mrs. M'Carthy and the Rev. W. Roberts had been talking about sending her to another school, and advised me to see the said Rev. William W. Roberts; but although I endeavoured to obtain information from the said Rev. William W. Roberts, I was unable to do so, as appears by my said former affidavit. The said Mrs. Bonner further informed me that she had given my daughter, the said Mary Ann M'Donnell, some dinner, but she was not there then, and she did not know where she was, but I might make myself easy, as she knew she was all right.

I most positively deny that, on my inquiring for my said daughter, Mary Ann M'Donnell, on the said 4th day of April, or at any other time, I threatened to kill or beat her, or had, or have now, any intention of beating her.

Badeley, for the defendants, submitted that that return was sufficient.

ERLE, J., said the father had a right to the custody of his child, and suggested that the learned counsel should say where the child was.

Cook Evans said he should be quite satisfied if that were done.

Badeley said it was not in his power to say where the child was at that moment; and he submitted, on the authority of *Reg.* v. *Greenhill* (*a*), that, if the child were brought up, the Court would not order her to be given up to the father, but would consult the wishes of the child.

ERLE, J.—Not in the case of a child of this age. The father would have a right to take her by force.

Cook Evans cited the case of *Alicia Race* (*b*), and he submitted that the father had the undoubted legal right to the custody of his child.

Badeley said the child was afraid to go home, for fear her father should kill her; and stepmothers were proverbially severe.

ERLE, J., said he could not enter into that or this return,

(*a*) 4 A. & E. 624. (*b*) *Vide supra*, n. (*a*), p. 275.

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and these affidavits, but he thought the father was entitled to have his child; he was responsible both here and hereafter.

Cook Evans said he was taken by surprise, by the charge of cruelty made against the father, and he was instructed he could give a complete answer to that charge. The fact was that the father wanted the child to go to a Protestant school, and the child wanted to go to a Roman Catholic school.

Badeley pressed the point as to cruelty (*a*).

ERLE, J., said he could not decide upon that without giving the father an opportunity of answering.

Badeley said his clients would attend to any intimation given by the learned Judge.

ERLE, J., said he thought the better course would be that the parties should tell where the child was, and that then he should do nothing with respect to the return.

Badeley said that in the course of to-morrow his clients would give notice to the attorney for the prosecution where the child was.

ERLE, J., said that if the address were given in the course of to-morrow this matter would be at an end.

The address was not given (*b*), and therefore *Cook Evans*

(*a*) The proper way to raise that question would have been to avow the custody of the child, and state cruelty; *vide Re Price*, *ante*, p. 263.

(*b*) The following letter was received from the attorneys for the defendants by the prosecutor's attorneys:—

"May 17, 1859.

"Gentlemen,—I beg to inform you, that having made inquiries both from the Rev. Mr. Roberts and from Mrs. M'Carthy, I find that neither Mr. Roberts nor Mrs. M'Carthy knows either the places where or the person with whom Mary Ann M'Donnell is residing. When the offer was made yesterday to give the name and address of that person (which was made without any previous communication upon the subject either with Mr. Roberts or Mrs. M'Carthy), I supposed that I should be able to give such information, but I find that it is not in my power to do so. I am, gentlemen, your obedient servant, F. R. WARD."

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applied for a warrant to apprehend the defendant Roberts for a contempt of Court, on the ground that the return was bad, and also false.

Two affidavits had also been filed, one by the Rev. Mr. Roberts, and the other by Mrs. M'Carthy. The reverend defendant's was as follows:—

1. I am the manager of the Roman Catholic School in York Street, Westminster. Mary M'Donnell and her sisters and brother were regular attendants at the school previously to the month of November last.

2. After the last Christmas holidays I believe the said Mary Ann M'Donnell attended the school for about three weeks, but after that time she ceased to do so, and I applied to her father, James M'Donnell, to send her back to the school. He objected to send her back on the ground that he did not like her companions, and that she was in the habit of playing with the other children of the school instead of returning home. Upon questioning him I found he could not specify any bad companions with whom she associated, and upon my undertaking to send the child home immediately after the school was over he promised to send her again to the school.

3. Having always believed and having heard from himself that he was a Roman Catholic, I went to the said James M'Donnell a second time, about three months ago, to induce him to fulfil his promise of sending his child to the school. I was urgent with him on this point, because I believed that he was acting against what he knew to be his duty, at the instance of his wife. On that occasion he did not promise to send the child, and I was subsequently confirmed in my impression as to the motive of his omitting to send the child to school, by his wife calling on me to request me to refrain from interfering between herself and her husband in the matter of the child. On a subsequent occasion when I saw him in the presence of his wife, he denied that he had any intention of ceasing to be a Roman Catholic.

4. On the 4th and 5th days of April last the said Mary Ann M'Donnell came to the said school in York Street of her own accord, and without being in any manner taken or sent there by me, or desired to go there; nor did I know, before I went to the said school, on either of those days, that the said Mary Ann M'Donnell would be there. On the 5th of April last I attended the said school in York Street, as usual, at about a quarter past eleven o'clock in the forenoon. On my going there I found Mrs. M'Donnell standing at the door. She said she had come to bring home Mary Ann M'Donnell. I allowed her to go into the school, and saw her go up to the said Mary Ann M'Donnell and endeavour to take her away. She endeavoured for some minutes to persuade the child to go with her, and was proceeding to use force, while the said child was resisting and crying violently. I told the said child to go home quietly

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but she continued to resist. The contest between the stepmother and the child created a great disturbance in the school, and I told the former that, as she had no authority to take the child, she had better fetch the child's father to take her away. The said Mrs. M'Donnell left the school at about half-past eleven o'clock in the forenoon. I waited at the school till twelve o'clock, when the school was over. The said Mary Ann M'Donnell's father did not come while I was there, and I did not see him on that day.

5. When I left the school, at about half-past twelve o'clock, the said child was in the schoolroom, or in the passage leading thereto. I visited the school again in the afternoon, and found that the child had then left it, and had taken refuge in the apartments of Mrs. Bonner. I also heard that the said child's father had been to the school. I went into Mrs. Bonner's apartments at about a quarter-past four to see the child, and found her there with the said Mrs. Bonner. I understood she was in great dread of returning to her father. The said child was not detained there by me or any other person, nor was she under the slightest restraint, but might have gone home to her father's house had she wished it, and her father, had he come for her, might have taken her away. When I left the said Mrs. Bonner's residence, the said Mary Ann M'Donnell remained there, but she did not appear to, nor, as I am informed and believe, was she under any bodily restraint, nor was any hindrance or impediment presented by me, nor as I verily believe by any other person, to prevent the said Mary Ann M'Donnell from returning to her father's house, nor did I give her any direction nor use any persuasion to induce her not to go home to her father's house. Since I so left her at the said Mrs. Bonner's house she has not been in any manner restrained by me, or in my custody or possession or under my control, nor in the custody or possession of any person employed by me or subject to my control. I did not at any time decline to see the said James M'Donnell, nor, to the best of my recollection and belief, did I ever say to him that I knew nothing of his child.

Mrs. M'Carthy's affidavit was as follows:—

I am schoolmistress at the Roman Catholic School in York Street, Westminster. Mary M'Donnell attended regularly the said school from February, 1858, to the end of November, 1858. Her two sisters and a little brother attended regularly from September, 1857. The said Mary M'Donnell attended for three weeks in January, 1859.

On the 4th of April, 1859, I saw the child Mary M'Donnell loitering about the passage after school hours, and I asked her why she was not going home, as her father would be displeased. She said she was not going at all. I asked her where she would go. She said she would go about the streets, or anywhere, rather than go home. I cautioned her, and begged her to go home, and she walked out to go home, as I thought.

On the 5th of April a woman came to the door and asked to see Mary

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M'Donnell, and I brought the child out to her. The moment Mary saw her she ran away and hid herself. Shortly after, about eleven o'clock, another woman, who I afterwards found was Mrs. M'Donnell, came to the school, and those two women endeavoured, by force, to remove the child. The Rev. Mr. Roberts, who had entered the school at the same time with Mrs. M'Donnell, stood by without interfering for some time, and I believe he then said something to the effect that he wished the child to go home quietly. I asked the women to let her stay till twelve o'clock, and that then she would go home, but they refused to allow her to stay till twelve. The whole class was in confusion, and all the children were crying and screaming. Then Mr. Roberts interposed, and said that as Mrs. M'Donnell had no authority over the child, she should send the father, in order that he might take her. Mrs. M'Donnell then left the school. In the dinner hour, I believe, her father came, but I was not at the school when he came. I saw Mary M'Donnell the same day at half-past four in the passage leading to the school, and afterwards in the evening, taking tea with Mrs. Bonner, and since that time I have not seen her, nor has she since been, nor is she now, in any way in my custody or power.

Badeley, for the defendants, argued that the return was sufficient, and that the affidavit sustained a case of cruelty against the father, upon which the Judge should hold his hand and not compel the child to return to him. *In re Race*, the Lord Chief Justice, in his considered judgment, said the Court would not order the child to be delivered to the parent if they could see it was desired for any improper purpose.

Cook Evans argued that the return was insufficient, and moreover shown to be false upon the facts, and that the charge of cruelty was a mere after-thought, and could not be raised properly on this return.

ERLE, J., said he thought the return insufficient, but it was a matter of such importance that he preferred the whole matter being submitted to the consideration of the Court, and that the warrant should issue nominally, and not be executed until after Mr. Roberts had declined to give the necessary security for the defendant's appearance before the full Court (*a*).

(*a*) This course was accordingly taken, and the whole matter argued in the ensuing term, when the return was held bad, and the defendants declared in contempt.

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Westminster, coram Pollock, C. B.

MORGAN *v.* RAREY AND ANOTHER.

Trinity Term.

ACTION against the executors of an innkeeper, the declaration (*a*) stating that the deceased, in his lifetime, was an innkeeper, and kept a common inn for the reception of travellers, and in consideration that the plaintiff at his request was received by him in the said inn, to abide as such traveller-guest, he promised the plaintiff to keep the goods and chattels which, while the plaintiff should so abide in the inn as such traveller (*b*), should be brought by the plaintiff into the said inn, *safely and securely* (*c*), without any loss or diminution while they should be within the said inn, and the plaintiff should so abide therein as such traveller.

Though the omission by a guest in an inn to lock his bedroom door, or bring his valuables to the bar, in compliance with a notice, may not *per se* excuse the innkeeper for a loss, all the circumstances are properly to be left to the jury on the question of negligence. But the innkeeper is liable unless the loss arose through his guest's negligence, and the action will lie against his executors.

Averment, that while the plaintiff was so abiding in the inn as such traveller, the plaintiff had with him as such traveller in the inn certain goods and chattels, &c., yet the deceased did not keep the same safely and securely without loss or diminution, by reason whereof the same were wrongfully taken by some person to the plaintiff unknown, and lost to the plaintiff.

Pleas: 1. That the deceased did not promise as alleged.

2. That the plaintiff, while he was abiding in the inn as such traveller, did not have such goods, &c.

3. That the deceased did not break his promise as alleged.

Honyman for the plaintiff.

Phinn and *H. Lloyd* for the defendants.

(*a*) As to the form of declaration, *vide post.*

(*b*) This is material, for if the plaintiff were in the inn as *lodger* he could not recover; *Parker* v. *Flint*, 12 Mod. 255; *Gubelin's Case*, Latch. 88; *Sands' Case*, Mod. 877.

(*c*) See *Ross* v. *Hill*, 2 Com. B. Rep. 877, as to the force of these words.

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The deceased kept the Great Northern Railway Inn, where the plaintiff one night became a guest. There was a printed notice in his bedroom in these terms :—

"Several robberies having taken place during the nights in the principal hotels of London, the proprietors request that all articles of value be left at the bar, otherwise they will not be held responsible for the loss of them."

The plaintiff denied that he had read this notice.

He had with him a gold repeater, some money, and other articles, and did not leave them at the bar, but kept them in his bedroom.

There was a night bolt to his door, and he did not use it; but he *locked* his door.

In the morning he found the articles missing, and they were not recovered, nor was it shown what had become of them, nor who had taken them.

On the part of the defendants it was objected :—1. That there was no evidence of negligence; that the deceased had done all in his power to prevent a loss, and was not liable absolutely as an insurer (*a*). 2. That the notice must be taken as incorporated with the contract, and relieved the deceased of all liability. 3. That the defendants, as *executors*, were not liable, the action not being founded on contract, nor for a "wrong" committed by the testator (*b*).

POLLOCK, C. B., reserved the points (*c*), and left it to the jury whether the plaintiff had, by his negligence, contributed to the loss, so as, that *but* for such negligence, it

(*a*) The modern cases are *Dawson* v. *Chaplin*, 5 Q. B. Rep. 164; *Armistead* v. *Wilde*, 17 Q. B Rep. 261; *Cahill* v. *Wright*, 6 E. & B. 89. *Et vide post*, p. 285.

(*b*) 3 & 4 Will. 4, c. 42, s. 2 :— "An action . . . may be maintained against the executors of any person deceased for any wrong committed by him in his lifetime to another, in respect of his property, so as such injury shall have been committed within six calendar months before such person's death, &c. See Finlason's C. L. P. Acts, p. 10, Edit. 1860.

(*c*) On which a rule was granted in Exch., but discharged.

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would not have occurred (*a*), telling them at the same time that the guest was not bound to lock his bedroom door nor to leave his watch or snuff-box, &c., or money or other articles, at the bar of the inn.

Verdict for the plaintiff (*b*).

(*a*) As to this, *vide Thorogood* v. *Bryan*, 8 Com. B. Rep 115; *Rigby* v. *Hewitt*, 5 Exch. 240; *Greenland* v. *Chaplin*, 5 Exch. Rep. 243. The defence is admissible under the general issue; *Holden* v. *Liverpool Gas Company*, 3 Com. B. Rep. 1. But *quære*, whether it is admissible in all cases of actions, even of negligence; *Martin* v. *The Great Northern Railway Company*, 16 C. B. 179. *Et vide ante*, p. 144.

(*b*) Although the case, which was argued in Mich. Term, had not been decided (the Court having taken time to consider their judgment), it would be reported, in this, as in other similar instances, as it occurred at Nisi Prius, because the *result* will be known in the profession long before the case is reported *in banco*, and it is well that the facts should be known; *et vide Filipowski* v. *Merryweather*, *infra*, where the declaration was different.

Coram Erle, C. J.

FILIPOWSKI *v.* MERRYWEATHER.

Michaelmas Term.

When property has been stolen from a guest in an inn, the innkeeper is liable, unless the plaintiff has contributed, by his own negligence, to the loss, and not locking his door is not such negligence.

ACTION against an innkeeper, the declaration stating that the defendant kept a common inn, that the plaintiff was received into it as a guest and traveller, and brought with him divers articles, a watch, &c., and abided in the inn as such traveller, and that the defendant did not keep the goods safely and securely, but that he and his servants so negligently conducted themselves in that behalf, that, whilst the plaintiff so abided in the inn as aforesaid, the goods were, *by and through the default and breach of duty of the defendant* in that behalf, stolen by persons unknown, and so became lost to the plaintiff (*a*).

(*a*) As to the declaration, *vide Morgan* v. *Rarey and another*, *ante*, p. 283, and note thereto. *There* it was in form an action on *promises*; here it was conceived as in an action of case, on the duty. But the form cannot affect the substance; the duty is what arises from the facts stated; *Brown* v. *Mallett*, 5 C. B. 599; so that it matters not

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FILIPOWSKI v. MERRYWEATHER.

Plea: not guilty.

Parry, Serjt., and *Hodgson*, for the plaintiff.

Tindal Atkinson for the defendant.

The defendant kept a commercial inn in London, and the plaintiff had slept there and lost a watch which he had with him in his bedroom over night, and missed next morning.

The chambermaid had been charged with stealing it, and had been taken before a magistrate, but, being released for want of evidence, she had absconded.

The plaintiff was cross-examined as to his having shown his watch to the maid over night, as to his not locking his door on going to bed, and as to his leaving his room door open when he had occasion to get up and go down stairs about six o'clock, just when the servants were rising. He said that he left it in the room on that occasion, and had not missed it on his return to the room, but on his rising about an hour afterwards.

Tindal Atkinson proposed to call the defendant, to show that he had taken every possible care and precaution, and that the loss was through the plaintiff's own negligence.

Parry, Serjt., objected, but,

ERLE, C. J., after considering the case of *Cashill* v. *Wright* (*a*), admitted the evidence.

The defendant, being called, was asked as to a custom

how it is alleged (*Ibid.*); and though, to the extent to which it does arise, there is an implied promise which *might* be stated, it *need* not be stated, and if stated, requires no proof beyond the fact or facts raising the duty in law; *vide* C. L. P. Act, 1852, ss. 49, 50 (Finlason's C. L. P. Acts, Edit. 1860, p. 82); and therefore the form of action is immaterial; *vide* same Act, s. 74; same work, p. 91. *Here*, however, the declaration states a *default*, though it stated a *stealing*. But notwithstanding that, the C. J., it is conceived rightly, held that evidence of contributory negligence was admissible.

(*a*) 6 E. & B. 900.

or rule in his house as to the custody of the keys of the bedrooms.

Parry, Serjt, objected, as it was not to the plaintiff's knowledge; but,

ERLE, C. J., said he did not see how he could exclude the evidence.

It appeared that the custom was for the keys to be kept at the bar, and not delivered to any one but the guests or the chambermaid.

The defendant being asked as to what had been said at the police-office, in the presence of the plaintiff,

Parry, Serjt., objected, that the depositions ought to have been produced; but,

ERLE, C. J., admitted the evidence, observing that, for the present purpose, it did not come within the rule as to what was called "pre-appointed evidence," as laid down by Mr. Best in his *Treatise on Presumptive Evidence*, p. 25 (*a*).

ERLE, C. J. (to the jury).—The case for the plaintiff is, that the watch was stolen from him while he was a guest in the defendant's inn. If so, according to the law of England, the defendant is liable, unless you are of opinion that the plaintiff's own negligence occasioned the loss. That would not be so if he "did all that a reasonable man might be reasonably expected to do *under the circumstances*" (*b*). Therefore it is necessary to consider all the circumstances, as that it was a London inn, where bad characters might be expected. If the plaintiff took less care

(*a*) *Ballantine*, Serjt., suggested that, as it did not appear that the depositions had been returned, the rule of evidence relied on by *Parry*, Serjt., did not apply.

(*b*) The innkeeper is liable as for a breach of duty, unless the negligence of the guest occasions the loss, in such a way as that the loss would not have happened if the guest had used the ordinary care that a prudent man may be reasonably expected to have taken under the circumstances; ERLE, J., *Cashill* v. *Wright*, 6 E. & B. 900.

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than a reasonable man might be expected to take under such circumstances, the defendant is not liable; but the plaintiff is entitled to your verdict unless you think that he was guilty of a want of ordinary care. Not locking his door was not such negligence.

Verdict for the plaintiff.

PRIESTLEY *v.* MACLEAN (*a*).

Michaelmas Term.

In an action of tort, for injury to the plaintiff, damage for loss of profit on contracts which *might* have been entered into by him, *held*, too remote, and not recoverable.

THIS was an action brought by the plaintiff to recover damages for injuries which he had sustained on the South Staffordshire Railway, of which the defendant was lessee.

Ballantine, Serjt., for the plaintiff, sought to give evidence of loss sustained by his inability to carry out contract, which, had he not been injured, he would have undertaken; and proposed to show that a person named Whitworth had been in treaty with the trustees of the parish of St. Stephen, Coleman Street, for a lease of land, on which he proposed to erect a factory and warehouses; that the plaintiff had assisted him in preparing designs, estimates, &c.; that whilst the plaintiff was lying ill from the accident, Whitworth being pressed by the trustees to conclude the bargain, applied to the plaintiff to undertake the buildings as formerly proposed, and the plaintiff being unable so to do by reason of his injuries, Whitworth abandoned the treaty for the land, whereby the plaintiff lost the profits which would have accrued to him.

Milward, for the defendant, objected that the damage was too remote.

ERLE, C. J.—I should have had no doubt about this matter had the plaintiff already made a contract with Mr. Whitworth; but you cannot recover damages for loss

(*a*) Reported by F. F. Brandt, Esq.

alleged to have been sustained from a possible contingency. Supposing a lady to have been injured and disfigured in a railway accident, she could not say that she ought to recover damages because she was prevented from going to a ball, at which she might have met a rich husband.

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Evidence rejected.

Coram Willes, J.

SCALES *v.* LAWRENCE.

Michaelmas Term.

COVENANT by tenant, so often as need should require, well and sufficiently to repair, uphold, sustain, *paint*, glaze, cleanse, scour, &c. a house and premises, with all needful reparations and cleansings, and to leave the premises in such repair, reasonable wear and tear excepted.

On a covenant, as often as necessary well and sufficiently to repair, cleanse, &c., and keep and leave in such repair, reasonable wear and tear excepted, the tenant, if he has repaired within a reasonable time before leaving, is only bound, in addition to the repair of actual dilapidations, to clean the old paint, &c., and not to repaint, &c.

Breach: leaving them *not* so repaired, upheld, &c. with all needful reparations.

Plea: payment into Court of 30*l.*

Replication, that this was not enough. Issue (*a*).

Hawkins and *Holl* for the plaintiff.

Petersdorff, Serjt., for the defendant.

The house, which contained three sitting-rooms and four bed-rooms, with kitchens, stable, outhouses, &c., and a large garden and field of some extent, inclosed in a fence, had been let to the defendant in 1852 for seven years, at a rent of 50*l.* a year.

He laid out a considerable sum on entering, and had also laid out 12*l.* in 1858.

The plaintiff called surveyors to show that the estimate for the requisite repairs on the defendant's leaving was 66*l.* But it appeared that this included repapering, and it did not appear that the old paper was more than dirtied.

(*a*) *Vide Robinson* v. *Harman*, 1 Exch. 850, and Finlason's C. L. P. Acts, Edit. 1860, p. 91.

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WILLES, J., held, that this, not being expressly mentioned in the covenant, was not comprised within its terms, as it was mere matter of ornament. The utmost that could be included was the cost of replacing such portions of the paper as might be absolutely torn off.

With regard to the painting, the plaintiff gave evidence that it was usual to paint the inside once in seven years, and the outside once in three years.

It was admitted that the whole had been painted in 1853, and that there had been some repairs in 1858.

Holl, for the plaintiff, contended that this made no difference, and that the tenant did not perform his covenant merely by repairing the premises when he entered, if when he left them they were not in a good condition.

On the part of the defendant, the plaintiff's witnesses were cross-examined as to the age of the house, which it appeared was 150 years old, and also as to its general condition when defendant entered, when it appeared that it was rather out of repair; and there was evidence as to its being in as good a condition when he left, reasonable wear and tear excepted, as it could be after between six and seven years' use.

The money paid into court was proved to be ample enough to cover all that could be considered as *dilapidations*.

The question was entirely as to the degree of repairs required.

WILLES, J. (to the jury).—You are to decide the question with reference to the terms of the covenants and the general character and condition of the premises when the defendant entered. By the covenant the defendant was bound to do the things specially mentioned, and also all that was necessary to leave the house in a good condition, with reference to the obligation of a tenant. As to that, you must consider the character and condition of the house; thus, if he takes an old house, he must not let it

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tumble down, he must keep it up; but only *as* an old house. No tenant is bound to leave, for his landlord, a *new* house; but *the house which he took*, in a state of fit repair, *as* such house. And if he has painted the outside in three years, and the inside within seven years, he is not bound to do it again when leaving, unless so far as is required by actual dilapidations or destruction of the paint; and so of other repairs. He may, if he likes, have the *benefit* of his repairs, so as he leaves the premises in a fit state, reasonable wear and tear excepted. If he painted and papered within seven years, and there is no damage in the way of breaking down or tearing off, then the reasonable construction of the covenant is, that he should "*cleanse*" the old paint, &c. (or renew it only where *destroyed*), and give up the house in a clean and fair condition, and for fair wear and tear he would not be liable. Questions of this sort are questions of fact for you, to be decided on what are the *substantial* merits of the case rather than on strict rights or extreme law. The landlord is not to claim for every crack in the glass or every scratch on the paint. The reasonable rule probably would be not to charge for a pane of glass merely with *one* crack in it, and so forth. Such covenants must not be strained, but reasonably construed, on the principle of "give and take."

Verdict for the defendant.

PELL *v.* ADDISON.

Michaelmas Term.

ACTION by an incumbent against the executors of a deceased incumbent for dilapidations in the chancel of the parish church.

An action for non-repair, the only plea being payment into Court, and the only question as to the sufficiency of the amount, turning merely on the facts, is fit to be referred to arbitration under the C. L. P. Act, 1854, s. 3.

Plea: payment of 70*l.* into Court.

Replication, that this was not enough. Issue.

Macnamara for the plaintiff.

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Griffits for the defendant.

It appearing that the only question was as to the degree or amount of repair requisite in the condition of the chancel, and a question arising as to the rule of law upon that subject,

WILLES, J., said, the case of *Wise* v. *Metcalfe* (*a*), which is considered as laying down the law on the subject, really does not settle it. It does no more than decide that the repairs are to be more than such as a tenant not under covenant to repair is bound to do, and less than what a tenant under such a covenant is bound to do. The reasonable rule is, perhaps, to put the edifice into *substantial* repair, without ornament.

This is a fit case for a reference to arbitration under the Common Law Procedure Act, 1854, sect. 3, as a mere "matter of account." It is just the kind of case mentioned by the Common Law Commissioners as an illustration; viz., an action for non-repair of a building, the question being only as to amount. Sitting at chambers, I should not have hesitated to order the action so to be referred, nor shall I hesitate to do so now (*b*), unless the parties agree together to a reference.

The parties then agreed to refer.

(*a*) 10 B. & C. 299.

(*b*) His Lordship having already (as other Judges have) held that a cause can be so ordered to be referred at *nisi prius*, the words "before action" having been *struck out of the clause*, though by mistake retained in the marginal note. *Vide* Finlason's C. L. P. Acts, Edit. 1860, p. 168. And it has also been held, that an action technically for unliquidated damages may be so referred. *Ibid.*

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Coram Erle, C. J. (*a*).

MACNABB *v.* JOHNSON AND ANOTHER.

Without a plea of immorality, defendant will not be allowed to give that fact in evidence as avoiding a contract, but may do so to impeach the plaintiff's credibility.

THIS was an action to recover a sum of 78*l.* for alleged arrears of wages due from the defendants as executors of one Peel, deceased. The declaration contained *indebitatus* counts for work and services, money lent and accounts stated.

Plea: never indebted.

The plaintiff was examined and stated, that Peel had engaged her as a housekeeper at wages of 18*l.* per annum, and that the amount claimed in the action was due.

Ballantine, Serjt., for the defendants, began to cross-examine the plaintiff on the circumstances attending her engagement and service, with a view to show that she really was engaged as a mistress, and cohabited with Peel as such.

Tozer, Serjt., for the plaintiff, objected. This is not relevant to the issue; there is no plea that the contract was invalid on the ground of its immoral nature; the sole question here is, if the agreement in question was made.

ERLE, C. J.—That is so, but I think it is competent for the defendants to put in evidence all the circumstances as tending to impeach the general credit of the plaintiff. I shall direct the jury, however, that it is not competent to them to find for the defendants, on the ground of the immorality of the contract, there being no such plea on the record.

Verdict for the defendants.

Tozer, Serjt., and *Hume Williams* for the plaintiffs.

Ballantine, Serjt., and *Prentice* for the defendants.

(*a*) This and the following cases are reported by F. Philbrick, Esq.

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GASKIN *v.* DAVIS.

In an action on a bill payable by instalments, it appearing that the action was commenced on the last day of grace, but there being no plea to that effect, nonsuit refused, but leave to move given.

THE declaration was on a bill of exchange for 55*l.*, payable by instalments of 1*l.* per week; it alleged the bill to be "now overdue," then set out its items, and concluded, "but did not pay the same."

Pleas: 1. Denial of the acceptance.

2. That before action defendant satisfied the claim of the plaintiff in respect of the said bill by payment.

The plaintiff's case was opened, that the defendant had regularly paid all the instalments down to the 9th October, 1860, but had paid none subsequently.

It appeared by the record that the action was commenced on the 19th October.

The defendant's counsel at the close of the opening, interposed and objected, that at any rate the action was brought too soon, as the days of grace were allowable upon each instalment, (citing *Sherborne* v. *Orridge* (*a*),) the last instalment being due on 16th October, and the last day of grace being the 19th.

Allen for the plaintiff. — This question does not arise on these pleadings, and it is not open to the defendant to raise it.

Atkinson, for the defendant, admitted there was no express traverse, the instalments were unpaid, and that the bill had not become due, but submitted that the declaration was informal, and that the defendant had been misled by it. He asked for leave to add a plea.

ERLE, C. J.—You may do so, but only on payment of costs of the day.

Atkinson declined to amend.

ERLE, C. J.—I think the action is too soon, but looking at these pleadings I will not nonsuit the plaintiff,

(*a*) 11 M. & W. 374.

I will reserve the point, and give the defendant leave to move (*a*).

Verdict for the plaintiff.

J. G. Allen for the plaintiff.

Tindal Atkinson and *Philbrick* for the defendant.

(*a*) In *Padwick* v. *Turner*, 11 Q. B. 124, a special demurrer to the form of declaration given under the rules of Will. 4, which ran thus—"which *period* has elapsed"—was set aside as frivolous. But more than one Judge at Chambers had held it *not* frivolous, and the decision of the Court was not given without hesitation, and probably on account of the aversion felt to technical objections on special demurrer. And certainly the form was not correct, as will be seen by reference to the old forms, which always alleged that the bill *had become due*. And the *new* forms are altered so as to make them accord therewith, alleging that the bill is "overdue." In the case alluded to it was considered that a denial that the bill was due would raise the question, as certainly it would now; and that being the proper plea, of course the ruling of ERLE, C. J., was correct.

Coram Pollock, C. B.

GILMORE *v.* WHITMARSH.

Michaelmas Term.

A foreign bill, bearing a stamp, defaced by the person who affixed it, prior to the indorsement to the plaintiff, but the defacement having *no* DATE, *held*, inadmissible in evidence, and, on the common traverses, the plaintiff held not entitled to recover upon it.

ACTION on a bill, drawn by defendant, accepted by one More, indorsed to Story, and by him to the plaintiff.

Pleas: denying the making, indorsing, &c.; and also denying the presentment and notice.

Hawkins and *Francis* for the plaintiff.

M. Chambers and *Overend* for the defendant.

It appeared that the bill was drawn by the defendant Whitmarsh in Paris, and by him there indorsed (*a*) and sent to Story, who indorsed it in London to one Monti who indorsed it to the plaintiff.

Story being called, proved that Monti put on a stamp before *he* (witness) indorsed it.

(*a*) Therefore, it was not within the definition of an inland bill, in the Mercantile Law Amendment Act, 19 & 20 Vict. c. 97, s. 7, as *drawn or made* in any part of the United Kingdom.

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GILMORE v. WHITMARSH.

The bill bore on it a stamp defaced by Monti, without date to the defacement (*a*); and

It was objected that the bill was not stamped when negotiated. The defacement should have been dated.

POLLOCK, C. B.—That is so. The object of the statute was to prevent the same stamp being used again; so the bill was not duly stamped before it was negotiated.

Hawkins.—There is no plea to raise the question.

POLLOCK, C. B.—A plea is not necessary. The statute enacts that no person shall be entitled to recover upon it. So it is inadmissible in evidence.

Hawkins tendered it in evidence upon the other issues, as to presentment and notice; but

POLLOCK, C. B.—The bill is inadmissible. There must be a

Nonsuit.

(*a*) 17 & 18 Vict. c. 83.

IRWIN *v.* LEVER.

Michaelmas Term.

Where a document was proved to have been in the actual possession of a party to the action, or to be now in the possession of his attorney in another action:—*Held*, that secondary evidence was admissible, notice having been given to that attorney to produce it; and, *semble*, that it would have been so even *without* such notice to the attorney.

THIS was an action for work done and services rendered.

Plea: never indebted.

Digby Seymour, *Biron* and *Laxton* for the plaintiff.

Shee, Serjt., *Ballantine*, Serjt., and *Tompson Chitty*, for the defendant.

The defence was, that the services were rendered under no agreement, save that contained in a written agreement with the plaintiff and one Holmes, the conditions of which had not been satisfied. The agreement was in the hands of one Lewis, the attorney of the plaintiff and Holmes in an action thereon in the Common Pleas, which was still pending.

Notice had been given by the defendant to the plaintiff (but not to his *attorney* in this action) to produce the do-

cument; and notice had been given to Lewis to produce it; but when called for he was not present.

Ballantine, Serjt., called the attorney for the defendant, who proved that in another inquiry he had seen the original produced from the custody of the now plaintiff; that Lewis acted as his attorney in the other action, and that copies had been obtained in this action under a Judge's order, which the witness produced and proved to be correct.

Digby Seymour proposed to call his client, the plaintiff, to prove that he had the document from his attorney in the other action, Lewis; but

POLLOCK, C. B., declined to admit such evidence.

Digby Seymour offered to call the plaintiff's attorney to prove that he had not the document in his possession; but

POLLOCK, C. B., refused to admit the evidence, as it would now be irrelevant.

Digby Seymour contended that the evidence was insufficient to admit of secondary evidence, and that the defendant ought to have *subpœnaed* Lewis; but

POLLOCK, C. B.—That was not necessary on the evidence as it stands. If he were present, and had the document here, he could no doubt be served with a *subpœna duces tecum* (*a*). But it is sufficient that notice has been given to him to produce the document, he being at this moment the plaintiff's attorney, although not in this action. The possession of the plaintiff's attorney is the possession of the plaintiff. Generally, documents of any value are in the actual custody of bankers, or attornies or agents of some kind; and though they *might* perhaps be *subpœnaed*, it is not *necessary* to *subpœna* them; when the *principal* is a party to the suit, it is sufficient to give the party notice

(*a*) *Dwyer* v. *Collins*, 7 Exch. 639. And see *Wright* v. *Bunyard*, *ante*, p. 193.

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to produce the document, and if he does not do so, then secondary evidence is sufficient.

The copies were then read. But the cause ended in a Nonsuit.

LONDON MONETARY ADVANCE COMPANY *v.* GATHERGOOD.

Michaelmas Term.

In an action on a bill signed by defendant as surety, a plea of fraud in the principal, with notice thereof to the plaintiff before the advance, which was the consideration, allowed to be altered into a plea of notice of revocation of the suretyship.

But such a defence *held* not sustainable, as there was a contract to make the advance, and the notice was after half notes had been sent.

ACTION on a bill of exchange for 60*l.*, accepted by the defendant and another person, and one Alpe.

Plea, *inter alia*, that the defendant was induced by one Alpe, by false representations, to accept the bill and indorse it to him to get it discounted by the plaintiffs; and that the defendant gave the plaintiffs notice of the fraud before they discounted it. Issue.

Davison and *Coleman* for the plaintiffs.

Griffits for the defendant.

It appeared that the defendant and the other party to the bill agreed to become sureties to the company for Alpe for an advance to him; they so agreeing on the faith of certain representations on his part, which they found out to be false. Previously to this discovery, however, they had not only entered into the agreement with the company for the advance on their suretyship, but had given the bill, and the company had actually remitted half-notes to Alpe for the amount agreed upon; but, before the other halves were sent, the defendant gave notice to one Elwood, the agent for the company, that they desired to withdraw.

Griffits tendered evidence of this notice.

Davison objected that there was no plea to raise the question; but

POLLOCK, C. B., said he should amend, if necessary, so as to allow it to be raised, as it was clearly the "real matter in controversy between the parties" (*a*).

(*a*) *Vide Irlam* v. *Dunn*, *ante*, p. 163, and *Evans* v. *Whittingstall*, *ante*, p. 175.

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The notice was in writing, and in these terms—"We, the undersigned, give you notice that we decline becoming boudsmen for Alpe for any sum of money."

The witness proved that Elwood said, on receipt of the notice, that the money had not been paid.

POLLOCK, C. B.—There is now some evidence of notice of withdrawal from the suretyship before the advances were made.

Davison.—That is not the defence set up, which is fraud on the part of Alpe, and notice of that fraud to the plaintiffs.

POLLOCK, C. B.—That is the form of the plea, but the substance of it is a revocation of the authority, and notice of it to the plaintiffs before they paid the money. It is not necessary to prove all the plea, but only so much of it as is sufficient to sustain a defence (*a*).

Davison.—That would be no defence, for there was a contract, which could not be revoked by one side only.

Griffits.—The contract by way of guarantee is unilateral, and may be revoked by the guarantor before it is executed (*b*).

Davison.—Here, it was not a mere guarantee, but an executory contract for an advance (*c*).

POLLOCK, C. B., reserved that point (*d*), and left the case to the jury, who found a

Verdict for the plaintiffs (*e*).

(*a*) *King* v. *Gillett*, 7 M & W. 55.

(*b*) See 5 M. & G. 131, 147, *dicta* of the Judges.

(*c*) As in *Boucher* v. *Murray*, 8 Jur. 648.

(*d*) See *Chappell* v. *Bray*, 29 L. J., Exch. 21.

(*e*) Supposing the contract here *not* to have been unilateral, but a contract between Alpe and the plaintiffs for a loan of money to him, it was certainly conditional on his finding sureties willing to be bound for the advance, and whether he could have sued them for not making the advance, would depend upon whether he could have averred that condition, assuming their withdrawal before payment.

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LONDON MONETARY ADVANCE COMPANY v. GATHERGOOD.

If he could *not*, then it might be held that they advanced the money in their own wrong, or must be deemed to have done so upon *his* security; and if so, then as regarded the defendants, his sureties, it would be the same as if the money had *not* been advanced, in which case the law would have been the same as in *Abbott* v. *Hendricks*, 2 Sc., N. S. 183, where it was held a good plea to an action on a bill that it was given for future services never rendered. And even as regards the sureties, the case would have resembled *Sleigh* v. *Sleigh*, 5 Exch. 514, where it was held that an accommodation acceptor could not recover money he paid to a holder *not entitled to payment* by reason of want of notice of dishonour. Even assuming that Alpe could have sued the plaintiffs for refusing the advance, it should seem that the damage would have been merely nominal or trivial; so in the converse case of their suing for the loss of profit on the transaction, the latter case resembling that of a vendor suing for non-acceptance of goods sold, for which, if he has taken them back, he cannot recover the *price; Lamond* v. *Devalle*, 9 Q. B. 1030; and the other case being that of vendee suing unpaid vendor for the goods; *Chinery* v. *Veal*, 29 L. J., Exch. 307, from which case it seems to result that the *vendor* suing could not have recovered on a *bill* given for the price. As to revocation, see *Chappell* v. *Bray*, 30 L. J., Exch. 24, and *Hotson* v. *Howitt*, *ante*, p. 233. On these grounds *Griffits* moved in H. T., but as half notes had been sent (*Smith* v. *Mundy*, 29 L. J., Q. B. 172), and the parties could not be put in the same position, the Court held the revocation too late, and refused a rule.

Coram Martin, B.

WILKINSON *v.* IBBETT.

Michaelmas Term.

Goods of a tenant's lodger being distrained along with the tenant's, and sold *first*, after notice from the lodger, and the tenant's goods turning out to be sufficient to satisfy rent and charges: *Held*, that the *lodger* was entitled to sue for an excessive distress.

ACTION for an excessive distress.

The first count stated that the defendant took and distrained certain goods and chattels of the *plaintiff Charlotte* Wilkinson, and one *S.* Wilkinson, as a distress for certain arrears of rent alleged to be due, and payable to a certain person in respect of certain premises on which the goods were, and which goods were of more than sufficient value to have satisfied the said alleged arrears of rent, &c. and

not only sold the same for an amount which satisfied the said arrears, but also sold the remainder, &c. (*a*).

Second count; for that the defendant took and distrained certain goods of the plaintiff as a distress, and sold the same, and out of the proceeds satisfied the said arrears, leaving a surplus; yet he did not, according to the statute (*b*), leave it in the hands of the undersheriff, &c. for the use of the plaintiff, &c.

Third count; in trover.

Pleas: 1. Not guilty by statute 11 Geo. 2, c. 19.

2. To so much of the declaration as complains of the defendant selling more of the goods than sufficient to satisfy the arrears; that he sold the same by the leave of the plaintiff. Issue.

3. As to the same payment in satisfaction. Issue.

Parry, Serjt. and *Griffits* for the plaintiff.

Coleridge for the defendant.

The plaintiff proved that his daughter had contracted with one L. for his interest in the premises, a shop and house, on which the distress was made, and that she had entered on the 18th May, when a half-quarter's rent was due, viz. 12*l.* 10*s.*, at the rate of 100*l.* a year.

The shop was a double one, and L. continued to occupy half for a month afterwards. The plaintiff's daughter took L.'s stock in trade, but had no furniture, and the *plaintiff* supplied the household furniture, residing with her. On the 24th June, a quarter's rent became due. There was an agreement negotiated between her and the landlord, P., but it was never signed. In August she paid half a quarter's rent. On the 9th November, 12*l.* 10*s.* was paid (another quarter having become due), and on the 12th a distress was put in for 25*l.*, the quarter's rent which re-

(*a*) *Tancred* v. *Leyland*, 16 Q. B. 669.

(*b*) *Yates* v. *Eastwood*, 6 Ex. 805.

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mained due. The goods, including stock and furniture, were appraised at 29*l.* 18*s.* 6*d.* (14*l.* the *furniture* and the rest the stock), and offered to her at that price but refused. She on the other hand offered to take the furniture at the condemned price, but *that* was refused. The whole of the goods, stock and furniture were afterwards (December 5th) sold, after notice from the plaintiff that the *furniture* was his. It was in respect of the *furniture* that the present action was brought.

There was evidence that the *stock* sold for 40*l.* and the *furniture* for 16*l.*, and that the whole was worth 70*l.* The furniture was sold *first*, and the account, including rent and charges 37*l.*, showed a surplus of 19*l.* There was a question as to the charges.

Coleridge objected, that the action was not maintainable by the plaintiff, but

MARTIN, B. overruled the objection.

At the close of the case,

MARTIN, B.—The law is, that, when a distress is sold, the seller must stop when he has sold enough to cover rent and reasonable charges. The distress must be reasonable, and if you think it was unreasonable and excessive find for the plaintiff. Was the *sale* excessive? were the *charges* unreasonable? They amount to forty-five per cent. on the amount. Even, however, assuming that the defendant's charges were correct, he sold for nearly 20*l.* more than rent and charges; that he could not lawfully do without the express authority of the plaintiff, which is pleaded. He should have sold up to the amount of the rent and proper charges, and then have stopped. If he had sold the stock first, it turns out that it would have been unnecessary to sell further. If that is so, the plaintiff is entitled to recover on the first count the value of his goods. As to the

other count probably you will think no damages necessary.

Verdict for the plaintiff (*a*).

(*a*) *Coleridge* moved, but took nothing. He admitted that *Bail* v. *Mellor*, 19 L. J., Exch. 279, was against him on the principal point, and tried to distinguish it. The Court took time to consider, and refused the rule, holding the action maintainable and the direction right. See *Smith* v. *Ashforth*, 29 L. J., Ex. 259.

Coram Bramwell, B.

BEHRENS *v.* GREAT NORTHERN RAILWAY COMPANY.

Michaelmas Term.

THE first count stated, that the defendants were common carriers of goods for hire, from London to Newcastle, and as such carriers received from the plaintiff certain goods, that is to say, *a case containing pictures* (*a*), to be by the defendants safely and securely carried from London to Newcastle, and there delivered for the plaintiff.

When the sender of goods, within the Carriers' Act, 1 Will. 4, c. 68, has duly declared their nature and value, it is for the carrier to demand the extra rate of charge, and if he does not do so, there is no default in the sender not tendering it; and *semble*, that he may aver readiness and willingness to pay it.

Averment: that all conditions precedent were performed (*b*).

Breach, that the defendants so negligently carried the goods that they were broken, torn and spoiled.

Second count: similar, except averring that the articles were above 10*l.*, and *declared* to be pictures of the value

(*a*) Thus then it appeared, on the face of the count, that the goods were such as *might* be within the stat. 11 Geo. 4 & 1 Will. 4, c. 68, s. 1, which provides, that no carrier shall be liable for losses, or for any injury to any article of the description stated, when the value shall exceed 10*l.*, *unless*, at the time of the delivery thereof at the receiving-house or to their servant, for the purpose of being carried, the *value and nature* of such articles shall have been declared by the person sending or delivering the same; *and* such increased charges as mentioned, *or* an engagement to pay the same be *accepted* by the person receiving such parcel. But this, being statutable, has always been *pleaded*; *vide Barendale* v. *Hart*, 21 L. J., Exch. 123. Moreover the value was not stated, and the count is *clearly good*, unless showing the value to be above 10*l.*

(*b*) Which would include readiness and willingness to pay any extra charge when demanded; *et vide per* BRAMWELL, B.

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BEHRENS v. GREAT NORTHERN RAILWAY COMPANY.

of 110*l.*, and that they were to be delivered for the plaintiff "for reward for the said carriage, together with a certain *increased rate of charges*," &c., an *engagement* to pay which was then accepted by the defendants.

Averment: of all conditions precedent (*a*).

Breach, as before.

Pleas: 1. Not guilty.

2. Denying the receipt as alleged.

3. To the *first* count: that the pictures were above the value of 10*l.*; that there was affixed in a conspicuous part of their office a notice, &c.; and that at the time of the delivery to defendants the value and nature of the goods *were not declared* by the person sending or delivering the same, *and* neither such increased charge as aforesaid *nor* any engagement to pay the same was accepted by the person receiving the said goods. Issue.

4. To the *second* count: that the plaintiff did not when he delivered the goods declare the same to be a case of pictures of the value of 110*l.*, nor were the same to be received for an increased rate of charge, nor was any engagement to pay the same accepted by the defendants. Issue.

E. James, *Keane* and *F. Lewis* for the plaintiff.

Hawkins and *C. E. Pollock* for the defendants.

A carman of the company received the package and gave the following note:—

"Received of Mr. Behrens a case of valuable paintings, declared over the value of 110*l.*"

This was signed by the carman. But no increased rate of charge was demanded or tendered.

There was some cross-examination as to the course of business with regard to the reception of goods, and the persons to whom the nature and value of the specified articles should be declared. But the main point raised

(*a*) *Sed vide supra* (*b*), p. 303.

was as to the absence of any tender of increased charge or of any engagement to pay it.

When the case reached its destination it was found broken, and a large rent appeared in one of the pictures.

It was not disputed that but for the statute the company were liable.

But when the plaintiff complained of the injury, and the increased charge was mentioned as required by the statute, he denied all liability to pay it.

BRAMWELL, B., pointed out that, as it appeared that, though the nature and value of the goods had been declared, there had been no payment nor engagement to pay the extra charge, the pleadings on the part of the plaintiff might require amendment (*a*).

No application for an amendment, however, was made, and at the close of the case,

BRAMWELL, B. (to the jury).—The act of parliament, no doubt, imposes upon the sender the duty of declaring the nature and value, but here there was such a declaration to the servant of the company receiving the goods, and I think that was sufficient. Then the question arises as to the next step. Now I think that the next step should be taken by the *carrier*, and that it is for him to name and demand the extra charge. It is not the duty of the sender to tender the extra charge, for he may not know the amount (*b*). Now here no demand was made of any extra charge; and therefore, in my view, there was no default in not paying it. The only question for you appears to be, in the event of the contrary view being taken, whether there was any engagement to pay such extra charge?

The jury finding that there was *not*, and assessed the damages at 35*l*.

BRAMWELL, B. said, the plaintiff was entitled to recover on the second count, and directed a

Verdict for the plaintiff, 35*l*.

(*a*) *Sed vide supra* (*b*), p. 303.

(*b*) See *Ashmole* v. *Wainwright*, 2 Q. B. 837.

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Coram Channell, B.

ASHCOMBE *v.* ELLAM.

Michaelmas Term.

In an action on a bill given to drawers for a balance of account on a purchase, and by them indorsed to plaintiffs, the defence being, that it was given for a larger amount than really due, the agreement of purchase between the defendant and the drawers allowed to be given in evidence unstamped, but, the amount admitted to have been due being paid into Court, and the pleas being to the residue, denying consideration, *semble*, that the plea was divisible, and might be construed distributively, and if not, it was amendable, as to the amount pleaded to.

ACTION on a bill of exchange for 100*l.*, drawn by two persons named Smart upon and accepted by the defendant, 3rd May, 1858, at sixteen months after date; indorsed by them to the plaintiff.

Pleas: 1. Except as to 50*l.*, that the defendant accepted the bill in payment of a certain balance of account of 50*l.* due by him to the drawers, and was induced to accept the bill for 100*l.* instead of 50*l.* through their fraud.

Averment, that the plaintiff took and held without consideration.

2. Similar, alleging *notice* to the plaintiff.

3. Similar, alleging that the plaintiff took the bill overdue.

4. For a defence on equitable grounds (except as to 50*l.*), that the bill was drawn for the balance of the purchase-money of a business, &c., which was 50*l.*, and no more; and that by *mistake of the drawers and the defendant* (*a*) the bill was filled up for 100*l.* instead of 50*l.*

Averment, that there was no other consideration, and that the bill was indorsed to the plaintiff overdue, without consideration and with notice of the premises.

5. To the same, that the bill was accepted on condition that it should not be negotiated until it was ascertained what the balance should be, &c.

6. As to 50*l.*, payment into Court, "repeating the allegations of the previous pleas" (*b*). Issue taken on all the pleas.

Hawkins and *Powell* for the plaintiff.

M. Chambers and *Keane* for the defendant.

(*a*) See *Wood* v. *Scarth*, Vol. I. p. 293.

(*b*) See *Armfield* v. *Burgin*, 6 M. & W. 281.

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ASHCOMBE v. ELLAM.

The issues being on the defendant, he began.

The drawers had sold the defendant a business for 450*l.*, and the bill was given for the balance. The case for the defendant was, that he had paid them 50*l.* in March, 1858, and 350*l.* in April, so that only 50*l.* was due. The 50*l.* first paid was before the agreement was finally entered into, which was on the 31st March. The defendant alleged that he had forgotten the first payment of 50*l.* when he gave the bill in question.

In the course of proof on the part of the defendant it became necessary to show the terms of the agreement actually entered into, which was in writing by letters between him and the drawers, unstamped.

The question being raised whether they were admissible,

CHANNELL, B., said he should hold that they were, not being put in for the purpose of being relied on as an agreement, but as part of the proof of an alleged fraud or transaction collateral thereto. No doubt the case was on the dividing line, and the line was a delicate one to draw, the agreement being certainly "made available," and as evidence; but still it was for a collateral purpose, and therefore, he thought, within the cases (*a*) dispensing with stamps, or at least it was so far *doubtful* that he should admit the letters.

Interrogatories and answers were put in, which the plaintiff swore that he had given "consideration" for the bill, without stating what it was, and that after paying himself what might be due to him and a per centage for collection, he was to pay the balance to the drawers.

At the close of the defendant's case.

Hawkins submitted that there was no defence; and

CHANNELL, B., said, that, even assuming the defendant's case, there was consideration for the bill proved.

(*a*) See these all collected as notes to the stamp clauses of the C. L. P. Act of 1854, Finlason's C. L. P. Acts, Edit. 1860, p. 184.

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ASHCOMBE v. ELLAM.

Keane thereupon called a clerk of the plaintiff, who proved that on the 6th September, 1859, the day the bill became due, it was in possession of the plaintiff; and that he knew plaintiff had sold and valued for the drawers, and did not know of any debt from them to him.

CHANNELL, B., said he was prepared to rule that there was no case for the defendant, but if the plaintiff went into evidence he should leave the whole case to the jury.

Keane called the plaintiff, who admitted that the drawers' debt to him was under 20*l.*

CHANNELL, B., thought that though the evidence showed that the consideration was less than 50*l.*, the plaintiff was a trustee for the drawers for the balance, and that the defendant could not on the pleadings claim to keep back any part of the 100*l.*

Keane submitted that the plea was divisible, but applied to amend if necessary.

CHANNELL, B., after consulting POLLOCK, C. B., said the case must go on, and he would amend if necessary.

Keane applied to amend the plea, if necessary, by making it deny any consideration *exceeding* 50*l.*

Hawkins then called the drawers, and went into evidence.

There was a contest as to whether the defendant had paid them 350*l.* or 300*l.* on the second occasion.

CHANNELL, B., left that question to the jury, who found that the defendant had only paid 300*l.*

Verdict for the plaintiff for 100*l.* and interest.

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Coram Martin, B.

GREGORY *v.* STANWAY.

Michaelmas Term.

The purchaser of a leasehold interest, entering into possession before execution of an assignment, *held*, entitled to sue seller for money paid to landlord under a distress for rent accruing due before entry.

ACTION for money paid. Plea: the general issue.

Montague Smith and *Baylis* for the plaintiff.

Hawkins and *Macnamara* for the defendant.

One P. was assignee of a lease, and the defendant had taken an assignment from P., who had taken from the assignees of the lessee, a bankrupt. The defendant had instructed one Beale, a house agent, to procure a purchaser for the lease, and in April a written agreement was entered into with the plaintiff by Beale, to assign the residue of the lease from Lady-day for 50*l.*, which was received by Beale. The contract was—"all rent due to Lady-day being paid, possession to be given immediately." Beale let the plaintiff into possession before any assignment was executed, and the landlord, in July, put in a distress for rent due up to Lady-day, which the plaintiff paid, and which was the money now sought to be recovered. The defendant knew the rent was due.

Hawkins submitted that there was no case; that there was no note in writing to answer for the debt of another, and that the plaintiff had no right to enter.

MARTIN, B.—The agent having authority to let, had authority to let him in. The defendant is liable. He was bound to indemnify the plaintiff. The rent was due and he knew of it, and the plaintiff was forced to pay it. That supports a claim for money paid to his use.

Hawkins called the defendant, who denied any authority to the agent to agree to pay the rent.

Verdict for the plaintiff (*a*).

(*a*) *Hawkins* moved, but took nothing.

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Michaelmas Term.

On an agreement to extinguish defendant's debt by transfer of a debt due from plaintiff to a third party; *their* agreement being in writing, and it being intended that defendant's should be so: *Held*, that the arrangement was not complete until *he* had signed.

Documents requiring a stamp may be taken as put in conditionally, on a point reserved as to their necessity or sufficiency.

WEBBER *v.* MOWBRAY.

ACTION for money had and received.

Pleas: 1. Never indebted.

2. That after the contracting of the debt the plaintiff was indebted to certain persons, T. & Co., in a sum exceeding the amount of the plaintiff's claim in this action, and it was agreed between the plaintiff, the defendant and the said T. & Co., that the defendant should pay to T. & Co., and that they should receive the amount so due from him to the plaintiff instead of his paying the same to the plaintiff, and that the defendant should thereby be discharged from paying the same to the plaintiff, and that T. & Co. should accept the defendant as their debtor to the amount of the defendant's claim, in lieu of and instead of the plaintiff, and that the plaintiff should be discharged therefrom. And thereupon and then in pursuance of the said agreement the defendant was discharged (*a*). Issue.

Hawkins and *Milward* for the plaintiff.

T. Jones for the defendant.

The defendant was, in the course of proving his plea, asked as to the alleged agreement, whereupon he was asked whether it was not in writing, and it appeared that it was, and there was a *letter* taken by the defendant to T. & Co., in the name of the plaintiff, in these terms:—

"I hereby agree that Mr. Mowbray shall pay to T. & Co. all the money received by him on my account, as part payment of the accounts between him and T. & Co., for machinery made by them on the order of Mr. Mowbray" (the debt due to T. & Co. being for the machinery ordered by Mowbray the plaintiff, as the agent of the defendant), "and I acquit Mr. Mowbray of any further responsibility on my account."

(*a*) *Evans* v. *Powis*, 1 Ex. 601.

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There was a memorandum written on this in the name of T. & Co. in these terms:—

"We hereby agree to receive the money as stated on the other side, from Mr. Mowbray, as part payment of our claim against Mr. Webb, and acquit Mr. Mowbray from further responsibility on account of Mr. Webb."

This letter was taken to T. & Co. by the defendant, he saying, "Get this signed by Webb, and sign this other yourselves." The defendant did not see T. & Co. or the plaintiff, but next day the papers were sent by T. & Co., signed by Webb and by themselves.

T. Jones proposed, after putting these papers in, to prove that the defendant had acted on the alleged agreement, and was willing to hold himself liable to T. & Co., and with that view, the papers not being stamped, offered to have them stamped, but

MARTIN, B., thought that they could not prove the pleas, there being no agreement in writing by Mowbray the defendant.

T. Jones submitted, that it was not necessary that there should be a written agreement.

MARTIN, B.—That might be, but here, if it was intended that there *should be* a written agreement, there would be no final binding agreement until the parties signed (*a*).

T. Jones.—The accounts between T. & Co. and the defendant had not been finally adjusted or the money would have been paid, but the defendant became *liable* to them, so the agreement was executed.

MARTIN, B.—I think the defence is not made out; but the documents may be taken as having been put in (*b*), subject to the payment of the penalty, if necessary.

Verdict for the plaintiff.

(*a*) *Boyd* v. *Hind*, 26 L. J., Ex. 164; 25 L. J., Ex. 246.

(*b*) By consent, *T. Jones* moved, in M. T., and (though there was some doubt on the point at first) it was assented to by the Court, that the documents might be taken as being in, and a rule was granted.

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Guildhall, coram Willes, J.

Michaelmas Term.

OAKLEY *v.* ODOON.

Where there has been an order to try at a particular sittings or assizes, the record cannot be *withdrawn*.

ON this case being called on,

Keane, for the plaintiff, desired to withdraw the record; but, it appearing that there had been an order by consent (on an application to change the venue) to try at this sittings,

WILLES, J., said that it would be a breach of good faith to withdraw the record after such an undertaking on the part of the plaintiff, and refused to allow that course to be taken.

Keane thereupon yielded to a

Nonsuit.

Coram Martin, B.

Michaelmas Term.

COULTON *v.* HANSON.

If particulars are not annexed to the record, under Rule 19, H. T. 1853, the cause may be struck out as irregularly entered.

ON this cause being called on it appeared that the particulars of demand were not annexed to the record according to the rule of Court, which requires that "a copy of the particulars of demand and set-off shall be annexed by the plaintiff's attorney to every record at time it is entered with the proper officer" (*a*); and

MARTIN, B., being informed by the officer of the Court that this omission had occurred in other cases, said that, as the rule was a very salutary one, he desired to give notice that in future he should strike out of the list every case where the rule was disregarded, and the costs of the day would fall upon the attorney guilty of the neglect (*b*).

(*a*) Rule 19, H. T. 1853. See Finlason's C. L. P. Acts and Rules, Edit. 1860, p. 264.

(*b*) Under the old rules, which did not require the particulars to be annexed to the record, it was doubted whether non-compliance with the order would preclude evi-

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COULTON v. HANSON.

Petersdorff, Serjt., and *Pearce*, for the plaintiff.

Hawkins and *Aspland* for the defendant.

dence of the demand or set-off (*Ibbett* v. *Weaver*, 16 M. & W. 770; *Young* v. *Geiger*, 6 C. B. 552), unless expressly so provided in the order. But probably the learned Judge deemed the effect of the present rule to be to make the entry of the record irregular without the particulars. As to *insufficiency* of particulars for generality, that ought to be objected to on summons before trial. *Hull* v. *Bollard*, 25 L. J., Exch. 304, see Vol. I., p. 227, note (*a*).

Coram Pollock, C. B.

NEVILL *v.* LOADMAN.

Michaelmas Term.

ACTION for maliciously, and without reasonable or probable cause, having the plaintiff arrested on a *capias ad respondendum*.

Plea: not guilty.

Sir *W. Atherton*, S. G., and *C. Pollock*, for the plaintiff.

Huddleston, *Macnamara* and *Shaw* for the defendant.

The now defendant had a claim against the present plaintiff, which was disputed, and for which, after repeated applications, he had sued him, and finding that he had taken a house in France, and, from information he had received, believing that he was likely to go abroad, he thereupon applied for and obtained a Judge's order for his arrest.

This order, however, was set aside by another Judge, on the insufficiency of the affidavits (*a*), which were founded chiefly on hearsay, and the now plaintiff paid 45*l.* into Court, which had been taken out of Court, but the action was continued and was still pending as to the residue of the claim.

A creditor, receiving information from one person that his debtor is going abroad, and obtaining an order to arrest him on affidavit, afterwards held insufficient and to some extent untrue, is not therefore liable to an action for maliciously obtaining the arrest without reasonable cause, there being enough to justify the belief that the debtor was going abroad. And the payment into Court of a sum over 20*l.* is a sufficient admission of a *debt* to justify the application. But, *semble*, that the action should not be brought while the former action is pending.

(*a*) *Pegler* v. *Heslop*, 1 Ex. 437; *Daniel* v. *Fielding*, 16 M. & W. 206.

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NEVILL v. LOADMAN.

The plaintiff being in the box,

Huddleston was cross-examining as to the contents of documents which there had been no notice to produce; and

Sir *W. Atherton*, S. G., objected; but

POLLOCK, C. B.—When one of the parties to the suit is being cross-examined, the rules of evidence, as to notice to produce and otherwise, are somewhat altered, and you may get anything you can from them (*a*).

There was evidence given on the part of the plaintiff to negative the statements in the affidavit of the defendant, and some of them were contradicted.

At the close of the plaintiff's case,

Huddleston objected, that the former action being still pending, the present action was premature.

Sir *W. Atherton*, S. G., answered, that as the amount paid into Court was above 20*l.*, the debt was sufficiently admitted; and that, as to the other elements of the case, the result of the first action could not possibly affect the question to be tried in the present one, which depended upon probable cause for belief that the plaintiff had intended to go abroad.

POLLOCK, C. B., so far acceded to this view that he declined to stop the action, though he said he was disposed to think that such an action *ought* not to be brought until the former action was concluded.

Huddleston contended that there was no evidence of malice, and that there was reasonable and probable cause for making an affidavit of the plaintiff's intention to go abroad.

Sir *W. Atherton*, S. G., urged that there were false statements in the affidavit.

(*a*) On the same *principle* which made evidence of an *admission* by a party allowable, though it related to the contents of written documents; *Slatterie* v. *Pooley*, 6 M. & W. 664. See also same point ruled, *per* POLLOCK, C. B., *Swinfen* v. *Lord Chelmsford*, Vol. I., p. 619.

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POLLOCK, C. B.—I am inclined to think that there is no evidence of malice, but that I shall leave to the jury. If the facts are, as stated by defendant, I shall rule that there was reasonable and probable cause for making the affidavit. The defendant received information from at least one person, which was reasonably sufficient to justify the application. And as to the truth or falsehood of the affidavit in other respects, that depends on the whole of the evidence. The *number* of instances would not be material, if on any one there was reasonable cause, as I think there was.

Verdict for the defendant.

DURRELL *v.* EVANS AND ANOTHER.

Michaelmas Term.

A hop factor, acting only for the grower, or seller, and not as broker for buyer as well as seller, *held*, that his signature was not sufficient to bind the *buyer* under the Statute of Frauds.

DECLARATION, that, by an agreement between the plantiff and the defendants, the defendants agreed to buy of the plaintiff certain pockets of hops, &c.

General averment.

Breach: non acceptance.

Plea: that the defendants did not agree, as alleged.

Sir *W. Atherton*, S. G., and *T. Jones*, for the plaintiff.

Hawkins (with him *Lush*) and *Butler Rigby* for the defendants.

The plaintiff, a farmer and hop grower, had (according to the usual practice in the trade) sent up samples of hops to Noakes & Co., hop factors, in Southwark.

On the 20th October a contract was entered into by the defendants at the place of business of Noakes & Co., of which the latter gave bought and sold notes; the sold note being, "Sold to Messrs. Evans 33 pockets, &c., E. Durrell;" and the bought note was, "Messrs. Evans, bought of Messrs. Noakes & Co., &c." The defendants took away samples of each pocket.

On the 23rd October, according to arrangement, the defendants' foreman attended at the warehouse of Noakes

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DURRELL v. EVANS and Another.

& Co., where the hops were, to see them weighed. Some one attended for Noakes's; the parties differed about the weighing. One of the defendants arrived, was dissatisfied, and declined to have anything further to do with the hops.

On the 9th November, Noakes & Co. sent to the defendants a delivery order in these terms:—"To Noakes & Co. Weigh and deliver to Messrs. Evans 33 pockets of hops, &c. J. Durrell. (Signed) J. N., for Noakes & Co." The defendants, however, declined to receive the hops, and retained the samples.

The case for the plaintiff was, that Noakes & Co. acted as brokers for both parties.

Hawkins objected that there was no note in writing "signed by the parties to be charged," or any agent on their behalf; that the notes made no contract, as they differed; that they merely amounted to invoices; and that there was no evidence that Noakes & Co. acted as brokers for both parties. And he offered to adduce evidence that in the trade it was understood that the hop factor acted only for the grower, and not as broker for the buyer.

POLLOCK, C. B., doubted if such evidence was necessary or admissible, and was of opinion that on the evidence, even as it stood, it was manifest that Noakes & Co. had acted for the plaintiff, and not for the defendants; but, with his Lordship's permission,

Hawkins called one or two witnesses to prove the understanding in the trade; and then,

POLLOCK, C. B., being of opinion that the signature by Noakes & Co. did not bind the defendants, they not having acted as *their* agents, directed a

Verdict for the defendants (*a*).

(*a*) With leave to move; on which, in H. T., *Lush* got a rule *nisi*; but, as the point is of importance, and occurs often in the trade, the case is reported, to draw the attention of the profession to it. *Et vide* observations, *ante*, p. 285, n. (*b*).

NORTHERN CIRCUIT.

York, coram Hill, J.

REGINA *v.* BATES.

Winter Assizes.

A deposition of a deceased witness, partly taken from the examination of the witness in the presence of the party accused on a previous day, and not then read over, but read over on a subsequent examination of the witness in the presence of the party accused, the witness then being further examined, and cross-examined on behalf of the party accused, and the notes of the magistrate's clerk of the whole being subsequently fair copied in an adjoining room, and then read over to the witness in the presence of the party accused, and signed by the witness and the magistrate, held to be admissible.

GEORGE BATES was indicted for a highway robbery, with violence, on the 8th of October last, on William Wilcock, filesmith, of Sheffield, and stealing from his person three half-crowns, his hat and his handkerchief.

Campbell Foster appeared for the prosecution.

Price for the prisoner.

It appeared that after the arrival of the prosecutor at York as a witness, and whilst living in lodgings waiting for the trial to come on, he had committed suicide by hanging himself in his bed-room. On the trial, therefore, the learned counsel for the prosecution proposed to put in the deposition of the deceased witness, under the provisions of the 11 & 12 Vict. c. 42, s. 17, to prove the facts of the robbery. For this purpose a policeman, named George Jackson, was called to prove the necessary facts, to render the deposition admissible under the statute. He proved that he had seen William Wilcock, the prosecutor, lying dead at his lodgings at York. That he was present before the magistrates at Sheffield, where the charge against the prisoner was inquired into. That the usual oath was administered to the prosecutor, and that he then made a statement in the presence of the prisoner, and after the statement he was cross-examined by Mr. Chambers, an attorney, on behalf of the prisoner; that the statement so made was taken down in writing, and was afterwards read over to and signed by the prosecutor.

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On this proof, it was proposed by the counsel for the prosecution to have the deposition read in evidence.

Price, for the prisoner, then cross-examined the witness, and elicited that the prosecutor had been twice before the magistrates. On the morning of the 9th of October, when the witness apprehended the prisoner and took him before the magistrates, the prosecutor then made his statement, and no deposition was then taken, and the hearing of the case was adjourned. Afterwards the deposition was made out in the town hall; he believed it was taken before the magistrates, but he could not undertake to swear that it had not been written out in another room by the magistrate's clerk, and read over and signed afterwards by the prosecutor. He believed it was taken before the magistrates.

Price submitted that the deposition was not admissible, as if taken in another room and not before the magistrate, it was not taken conformably with the statute; and if his LORDSHIP had any doubt about the facts, he would call Mr. Chambers, the attorney, who appeared for the prisoner before the magistrates, who would prove that the deposition had been taken in another room. He referred to *R.* v. *Smith* (*a*), as establishing that the deposition must be taken in the presence of the prisoner, so that he might have an opportunity of cross-examining the witness. He referred also to the authorities collected in Archbold's Criminal Law (*b*) to the same effect. Here the prisoner had not had that opportunity of cross-examination, and he submitted that the deposition was not admissible.

Campbell Foster submitted that the deposition was clearly admissible under the statute on the policeman's evidence; and even if the facts were as suggested on the

(*a*) 2 Stark. 211, n. (*a*). And see Roscoe's Crim. Ev. pp. 68, 69, ed. 1857; *Reg.* v. *Johnson*, 2 C. & K. 394.

(*b*) Page 210, ed. 1853.

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other side, and the deposition had been taken in an adjoining room after the examination before the magistrate by the magistrate's clerk, and afterwards read over to the witness and signed by him in the presence of the prisoner, although this practice was one which had been condemned, it would not render the deposition inadmissible. He referred to *Reg.* v. *Calvert and Others*(*a*), where a deposition taken in an adjoining room to that in which the magistrate sat, by the clerk in the prisoner's presence, and afterwards read over in the presence of the prisoner, the witness being then sworn to the truth of the deposition was admitted by Mr. Baron ROLFE, although he condemned the practice.

HILL, J., said, the facts were for him, and he was not satisfied as to the mode in which the deposition had been really taken from the evidence of the policeman. It might turn out that it had not been taken in accordance with the statute. He would hear what evidence Mr. *Price* had on this point.

Price then called Mr. Chambers, the attorney for the prisoner, who stated that on the 9th of October, he attended before the magistrates as attorney for the prisoner, when he was first before the magistrates. Both the prisoner and prosecutor were present; the prosecutor made a statement to the magistrate which was not taken down in writing. He asked the prosecutor a few questions in cross-examination, and those questions were not taken down in writing. The case was then adjourned to the following day, when the prisoner was again brought up before the same magistrate. The prosecutor was again sworn, and Mr. Smith, the magistrate's clerk, read over to the prosecutor a written deposition which had been taken previously to the second hearing. Witness cross-examined the prosecutor, and that cross-examination, or some part of it, was taken down by Mr. Smith, and from his notes it was afterwards copied,

(*a*) 2 Cox's C. C. 491.

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brought before the magistrate, and signed by the prosecutor in the presence of the prisoner.

His LORDSHIP.—A fair copy?

Witness.—Yes, a fair copy of the cross-examination taken down on the copy, which had been previously read.

His LORDSHIP said, on this evidence he should hold that the deposition was admissible in evidence. In the London police offices, where a great number of charges were daily heard, it was the constant practice to have the abbreviated notes taken during the examination of a witness by the magistrate's clerk, fair copied, in full, in an adjoining room, and that copy afterwards read over in the presence of the prisoner, and signed by the witness; and the business of these offices could not otherwise be carried on. He thought such a practice not only convenient but within the spirit and intention of the statute, as the prisoner had full opportunity as well as the witness of objecting, if the evidence were put down incorrectly.

The deposition was then given in evidence.

The prisoner was afterwards acquitted on the facts proved.

REGINA *v.* WRIGHT.

Winter Assizes.

Forgery of a document not in the nature of "an undertaking for the payment of money," and not "an acquittance or receipt for the payment of money."

THE prisoner was indicted for forging an agreement, of which the following is a copy.

"Judgment for the plaintiff.

"No. M. 460. In the County Court of Yorkshire, holden at Scarborough. Matilda Archer, plaintiff, and John Wright, defendant. Notice dated 18th of January

Forgery at common law. The Court will not amend (under the 14 & 15 Vict. c. 100, s. 1) an indictment by striking out the word "feloniously," and thereby convert the charge into a misdemeanor, where the document given in evidence to sustain a charge of forgery, (made felony under the stat. 11 Geo. 4 & 1 Will. 4, c. 66, ss. 3, 10,) will not sustain the charge of felony, although evidence of a common law misdemeanor.

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for the 1st of February. Execution dated February 4th, 1860.—17*l.* 13 *s* 8*d.*

"Memorandum of agreement betwixt the said plaintiff and the said defendant by mutual consent. That the said plaintiff arranges to wait for the balance now due, and to waive all proceedings whatever and whatsoever against the said defendant, for the term of four months.

[Viz. from the 13th day of May, 1861, to the 13th day of September, 1861. And to allow for putrid bacon 5*l.* 5*s.*, and on costs 1*l.* 5*s.* Balance due 7*l.* 3*s.* 8*d.*]

"Upon the conditions as above and now stated, that the said defendant do pay to the said plaintiff the sum of 4*l.*

"Received the sum of four pounds on account of the debt and costs in this action, this 20th day of April, 1860 [and the balance, seven pounds 3*s.* 8*d.*, to be paid 13th day of September, 1861.]

(Signed) "MATILDA ARCHER, plaintiff.
"JOHN WRIGHT, defendant.

"Witness to this memorandum of agreement.
"WM. U. TASKER."

The prisoner was a lodging-house keeper and accountant, residing at Filey, and the prosecutrix a grocer and provision dealer living in the same town. The prosecutrix had supplied the prisoner with provisions to the amount of 13*l.* 12*s.* 9*d.*, and being unable to get payment of her debt had sued the prisoner in the County Court and obtained judgment for her debt and costs in December, 1859. The amount recovered not having been paid according to the order of the Court, the prisoner was served with a summons upon the judgment in January, 1860, and ordered to be committed for forty days, unless the debt and costs were paid within a month. The debt was not paid and the prisoner kept out of the way, but through his wife induced the prosecutrix to accept 4*l.* in part payment, and the remainder in four months. An agreement to that effect drawn out by the prisoner, and with a receipt at the bottom

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for 4*l.* was submitted to the prosecutrix, who took a copy of it, and she agreeing to it, received the 4*l.* and signed the receipt, which the prisoner's wife took away. The execution of the warrant was then suspended for four months, at the expiration of which time the balance of the debt and costs not having been paid, the bailiff of the County Court was directed to put in force the suspended warrant, when the prisoner produced to him the agreement copied above, on receiving which the bailiff discharged him out of custody, conceiving he had no power to detain him. On inspecting the agreement it was found that the words inserted between brackets, and which were not in the original agreement, had been introduced in it in the prisoner's handwriting, the effect of which was to reduce the balance of the debt and costs remaining due by 6*l.* 10*s.*, namely, from 13*l.* 13*s.* 8*d.* to 7*l.* 3*s.* 8*d.*, and to postpone the payment of the said balance to the 13th of September, 1861, or nearly a year and five months instead of for four months as agreed upon. This alteration of the document was the forgery, with which the prisoner was charged. He was indicted under the stat. 11 Geo. 4 & 1 Will. 4, c. 66, ss. 3, 10, in the first count, with feloniously forging a certain agreement, purporting to be made between Matilda Archer and the prisoner, (setting out the above document verbatim,) with intent to defraud.

A second count charged him with feloniously forging a certain agreement, purporting to be made between the said John Wright and Matilda Archer, with intent to defraud.

A third count charged the prisoner with feloniously "altering a certain undertaking for the payment of money" (describing the agreement), with intent thereby to defraud.

A fourth count charged him with feloniously forging and altering a certain "acquittance and receipt for the payment of money," with intent thereby to defraud.

There were four other similar counts, charging an utter-

ing of the documents described as above, knowing them to be forged, with intent thereby to defraud.

Price, for the prisoner, submitted as to the first two counts, that the document charged to be forged was not an agreement.

HILL, J., directed his attention to the third and fourth counts.

Then as to the third count, this was not an undertaking for the payment of money within the meaning of the statute. If anything, it was an undertaking by the prosecutrix to forbear pressing for payment.

HILL, J.—I am quite clear that it is not an undertaking for the payment of money. The prosecutrix does not undertake to pay anything.

Price submitted also that this was not a forgery of "an acquittance and receipt for the payment of money," under the fourth count. So far as it purported to be a receipt or acquittance for 4*l.* it was not a forgery but a true document.

Campbell Foster for the prosecution. As to the fourth count submitted that the document, if it could be described by any term, was rightly described as an "acquittance and receipt for the payment of money." The effect of the alteration in the document was "to acquit" the prisoner of 6*l.* 10*s.* of the sum that he owed and make it appear that the prosecutrix assented to his debt being reduced from 13*l.* 13*s.* 8*d.* after the payment of the 4*l.*, to 7*l.* 3*s.* 8*d.* He referred to *Reg.* v. *Vaughan* (*a*), where an alteration in a document, varying the amount for which a receipt was given, was held to be a forgery of the receipt.

HILL, J., said in that case there had been an alteration in the sum for which the receipt was given. In this case there was no alteration in the sum for which the receipt

(*a*) 8 C. & P. 276.

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was given by the prosecutrix. If the document were a forgery at all, it was a forgery at common law, and the prisoner could only be indicted for the common law misdemeanor (*a*). In the present case he was indicted under the statute for a felony; there must therefore be an acquittal.

Campbell Foster then submitted, his LORDSHIP having so held, that an acquittal should be taken on the third and fourth counts, and on the corresponding counts for uttering, and he would then ask his LORDSHIP to amend the first and second counts and the corresponding counts for uttering, by striking out the word "feloniously." He submitted that, under the 14 & 15 Vict. c. 100, s. 1, his LORDSHIP had the power to do this. He admitted that the application was a novel one, and he was not aware of any authority going to this extent; but the statute was recent, and the words of the section giving the power of amendment in certain cases to the Court seemed large enough to embrace the present case:—"Whenever on the trial of any felony or misdemeanor there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof in, &c., &c." (setting forth a number of things), "or in the name or description of *any matter or thing whatsoever therein named or described*," then "it shall be lawful for the Court before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence on such merits, to order such indictment to be amended." On this trial, his LORDSHIP having held that the document on which the prisoner was indicted amounted only to a forgery at common law, which was a misdemeanor, whereas it was stated

(*a*) The counterfeiting of any writing with a fraudulent intent, whereby another may be prejudiced, is forgery at common law. East, P. C. c. 19, s. 7, p. 861. And see 2 Russell on Crimes, pp. 318, 358.

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in the counts in the indictment referred to, to be a "felonious" forging, this was a variance "in the description of a matter or thing therein named or described" which his LORDSHIP had power under this section to amend, as the description clearly was not material to the merits of the case.

HILL, J.—Show me an authority where the Court has made an amendment altering the quality of the offence found by the grand jury from a felony to a misdemeanor.

Campbell Foster admitted that he was not aware of any such case. The application raised a new question, which he submitted, under the statute, his LORDSHIP had power to decide, by making the amendment if he saw fit.

HILL, J., said he should hesitate before making such a precedent, as altering the offence charged was altering the offence found by the grand jury. He also referred to the third paragraph in the note of Mr. Greaves on this section of the statute:—"As this section originally stood, immediately after the words 'persons whatsoever therein named or described,' followed the general words, 'or any variance between such statement and the evidence offered in proof in any other matter or thing whatsoever.' These words were objected to as being too general, and struck out on that ground in the House of Lords." He should not therefore be the first to make such an amendment (*a*).

The prisoner was therefore acquitted.

(*a*) In the same note Mr. Greaves says, "The taking out of the general words is much to be regretted, as cases precisely within the same mischief as those provided for will very probably occur."

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A witness protected by a certificate under the 15 & 16 Vict. c. 57, and refusing to answer matters criminatory of himself, but in respect of which he was protected by his certificate, may be committed for his contempt.

Such a certificate is a complete protection against all penalties, actions, prosecutions and proceedings whatever that could be taken against him, and the witness is bound to answer.

The Judge, where a witness refused to answer, and the prosecution will fail without his evidence, will, on the application of the counsel for the Crown, to prevent a failure of justice, discharge the jury.

THIS was a criminal information filed by the Attorney-General, charging the defendant with bribery at an election, held at Wakefield in the year 1859.

The first count charged him with acts of bribery. There were various other counts charging different acts of bribery of various persons.

The *Solicitor-General*, *Overend*, Q.C., *Monk*, Q.C., and *Cleasby*, Q. C., appeared on the part of the Crown.

West opened the pleadings.

Sir *Fitzroy Kelly*, Q. C., *Mellish*, Q. C., *Maule* and *Quain* appeared on the part of the defendant.

It appeared from the opening statement of the learned Solicitor-General that this was an information filed against Mr. John Barff Charlesworth by the Attorney-General, for giving bribes at the last election for Wakefield in April, 1859.

The defendant, Mr. John Barff Charlesworth, was a gentleman in partnership with his cousin, Mr. John Dodgson Charlesworth, a gentleman owning a very considerable colliery property in the neighbourhood of Wakefield. In early life the defendant had been called to the bar, and had practised on this circuit, and he was a gentleman who must have known to some extent at least that it was wrong and illegal to mix himself up with such proceedings as those with which he stood charged. The charge against him was twofold; that he advanced and paid money to the intent that some portion of it should be expended in bribery, and that he gave money to individual voters to induce them to vote for his cousin. The borough of Wakefield owed its franchise to the Reform Bill, and its electors were unmixed, and composed entirely of 10*l.* householders. The candidates were Mr. Leatham, who had been a banker at

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Wakefield, and a member of a well-known firm there, and Mr. John Dodgson Charlesworth. The nomination-day for the election was fixed for the 28th of April, 1859, and at the election, on the show of hands, Mr. Leatham had the majority. A poll being demanded, the polling was fixed to commence next day, the 29th of April. The result of the poll was that Mr. Leatham was returned by the narrow majority of three votes, the numbers being 406 for Leatham and 403 for Charlesworth. The contest was a very severe one, and a very active canvass was carried on for several days. Mr. Leatham's opponents, being dissatisfied with the result of the election, presented a petition to Parliament against the return, which was referred to a select committee, who decided that Mr. Leatham's was not a good seat, and in addition reported to the House of Commons that corrupt practices extensively prevailed at the election. The Act of Parliament under which that report was made, the 15 & 16 Vict. c. 57, was an Act to provide for a more effectual inquiry into corrupt practices at elections. The substance of the provisions of that Act were, that upon a report made by a Parliamentary committee, followed by an address from each of the two Houses of Parliament to her Majesty, a commission might issue to inquire into any corrupt practices at an election. Under such a commission the commissioners had very large powers; persons were bound to answer, and no answer so given could in any legal proceedings be made use of afterwards against them, and more than that, if persons answered in such a manner as to satisfy the commissioners that they had made a full disclosure, the commissioners had authority to issue a certificate, which was a protection to the person receiving it against any penal or legal consequences arising from the evidence so given. A commission in the present case was issued, and the commissioners appointed were Mr. Serjeant Pigott, Mr. Henry Willes and Mr. Wyndham Slade. Among other persons, they called

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before them Mr. John Barff Charlesworth, the defendant. He failed to satisfy the commissioners that he had made a full disclosure, and they in consequence refused to give him a certificate. Of course, no statement would be given in evidence against him that he had made; but the evidence against him would be confined to facts to be proved, apart from his own evidence. The defendant's cousin was one of the candidates at the election. The first step taken by the defendant was a proceeding which took place on the 10th of April, a fortnight before the election. On that day the defendant waited on Messrs. Beckett, the bankers, at Leeds, and delivered to Mr. Beckett two documents,—one a letter from Mr. John Dodgson Charlesworth, and the other a debenture of the Stockton and Darlington Railway Company for 5,000*l.* The letter was dated:—

"Hatfield Hall.

"Gentlemen,—My cousin, Mr. J. B. Charlesworth, is wishful to open an account at your bank. I have given him a debenture on the Stockton and Darlington Railway, which he will deliver to you.

"J. DODGSON CHARLESWORTH."

Mr. John Dodgson Charlesworth had an account at the bank before then; but Mr. John Barff Charlesworth had not. He would now state how the great bulk of that sum of 5,000*l.*, namely, 4,600*l.*, was withdrawn from the bank. The defendant took his cheque to the bank, and received into his own hands, on the 16th of April, 1,000*l.*; on the 23rd of April, in the same way, he received 1,000*l.*; on the 27th of April, 1,500*l.*; on the 29th of April, 500*l.*; on the 3rd of May, 260*l.*; and on the 5th of May, 500*l.* On the very days when he had drawn these large sums he had paid them over to Mr. Fernandes, a friend and partisan of Mr. John Dodgson Charlesworth, with the exception of two sums of 500*l.* each. Mr. Fernandes was a gentleman in good position in the borough of Wakefield, a corn merchant, and an alderman of the borough. The proposal that

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these funds should be placed in Mr. Fernandes's hands had emanated from that gentleman. He had paid to a person named Alder 35*l.*, and on other occasions he had paid to that person 1,000*l.* between the 20th and the 30th of April. Alder was a corn factor's clerk at Wakefield. A gentleman named Shaw had received 40*l.* from Mr. Fernandes. A person named Moore, a stranger from Bishop Auckland, had received a sum of 535*l.* A person named Stephenson had received 226*l.*; 100*l.* had been paid to a gentleman named Serle; 26*l.* had been paid to a man named Bendon; 19*l.* to a man named Tack, and various other sums amounting to 459*l.* These payments were made for purposes connected with that election. He had omitted to mention a person named Brear, who had received 1,400*l.* from Mr. Fernandes in three several payments. The evidence as to Brear was very important when they came to consider with what object the money was paid to Mr. Fernandes, and whether it was not given to him to be spent in bribery by the defendant. Brear was a maltster at Wakefield, and a very active partisan. He informed Mr. Fernandes on the 22nd of April, just a week before the election, that "the other side were bribing right and left, and unless something were done the election would be lost," and wished that money should be given to him. Immediately after this conversation Fernandes delivered to Mr. Brear 500*l.*, and subsequently other sums. Unfortunately Brear had died. His evidence would have been important as to the giving of bribes to particular voters, but not in any other way. The charge against the defendant was, that he had advanced and paid money to Mr. Fernandes with the intent that that money, or some part thereof, should be expended in bribery at the then Wakefield election. All the money given in bribes, to the amount of 1,400*l.*, they traced as given through Brear, and in one case, from him, through a man named Whitehead. The first person to whom it would be proved a bribe was given was a person

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named William Wells, a tailor, in Wood Street, in Wakefield, and it was to be observed that the recipients of these bribes were not in the lowest class; they seemed to be tradesmen in fair and respectable business. Notwithstanding that, they had received bribes and were open to receive bribes. In some instances they had kept faith with their bargain. In others they either did not vote at all, or voted on the other side. Wells had received 40*l.* for his vote, and had voted accordingly. The next person was Samuel Giffard, a tailor, in the Market Street. He had received for his vote two sums of 15*l.* to vote for Charlesworth. He had voted for Mr. Leatham; he had been guilty of the additional wickedness of receiving a bribe and then voting on the other side. The next was a person named Willcock, who was a gardener carrying on business in Wakefield, who had received 30*l.* On the day of the election he had taken his vegetables to the market, and never voted at all. There was a man named Moore, a stranger in the town, whose pedigree nobody could trace, and who was called the "Man in the Moon." He was thought to move about and dispose of money in a way which nobody could trace. He had received a sum of 500*l.*, and out of that he had paid to Mr. Lang, innkeeper, a sum of 50*l.*, and he did not vote at all. Next came a Thomas Stead, a shopkeeper, in Northgate, Wakefield, who had received 60*l.*, which was paid to him by Dan Robinson, an understrapper to the "Man in the Moon." The money was thus traced to Moore, from him to Fernandes, and from him to the defendant and to Beckett's bank, where it had been placed by Mr. J. D. Charlesworth, the candidate. These were the facts which would be laid before them. His duty was to make out the intent with which the money so paid was advanced to Mr. Fernandes. The learned counsel then proceeded to contend that the various facts connected with the advance of this money left no doubt that the intention with which it was so

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advanced was for the purposes of bribery at the then election for Wakefield. None of these expenses had been sanctioned by the election auditor, and if the facts were established by proof it would be the duty of the jury to return a verdict of "guilty."

Formal proof was then given of the issuing of a writ for the election of a member for Wakefield on the 23rd of April, 1859, and of the register of voters. The number of voters in the borough was 952; the candidates were Leatham and Charlesworth. The nomination day was Friday, the 29th of April; Leatham had the show of hands, and a poll was demanded for Charlesworth on the following day. On the 2nd of May, Leatham was declared at the head of the poll, the votes being 406 for Leatham and 403 for Charlesworth. The accounts of the election auditor of Charlesworth's expenses amounted to 634*l.*

Proof was then given that Mr. J. D. Charlesworth had deposited a debenture for 5,000*l.* as security at Messrs. Beckett & Co.'s bank, at Leeds, who, at his request by letter, had opened an account with the defendant, who had drawn out 4,750*l.* at various times during April and May, by cheque, the sums ranging from 1,500*l.* to 250*l.*, which had been paid to the defendant himself.

José Louis Fernandes, examined.—Is a corn merchant in Wakefield. Has been many years so, and four years an alderman of that borough. Witness declined to answer whether he had taken an active part in municipal and parliamentary elections for the borough of Wakefield.

The JUDGE said, no possible answer he could give to that question could criminate himself.

Answer.—I have. Have known J. B. Charlesworth, the defendant, for many years. I also know J. D. Charlesworth. Was on terms of intimacy and friendship with both. They are in partnership as colliery owners.

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The defendant was bred to the bar. Witness declined to say whether he remembered the election of 1859.

His LORDSHIP.—You must answer that, sir; you are asked only the fact.

Witness.—Certainly, he remembered it. Was in Wakefield during the election. He knew Mr. J. D. Charlesworth was a candidate. Witness was an elector, and voted for Charlesworth. He recollected the nomination and poll. He declined to say whether he received any sums of money from defendant in April, 1859.

His LORDSHIP said the objection might be well founded.

The witness said he was examined by the commissioners at Wakefield and received a certificate.

Sir *F. Kelly* objected to the question, but withdrew the objection, as the question was for the decision of the Judge.

The certificate was handed to his LORDSHIP, who asked for the production of the commission. He then said he would consult Mr. Justice KEATING as to whether the witness was compellable to answer the question or not. On his return,

His LORDSHIP said: Witness, I am bound to tell you that my brother KEATING and myself have considered this question calmly, whether you can be exposed to any peril, and we are both of opinion that you are free from all penal actions, penal disabilities and criminal prosecutions of every kind and sort, for any matter relating to that election, and having formed that opinion, on full consideration, I am bound to tell you that it is your duty to answer that question.

Witness.—I have taken the opinions of Mr. *Jones* and Mr. *Price*, my counsel, and I am advised that the certificate is not a sufficient indemnity from an impeachment of the House of Commons.

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His LORDSHIP.—I am of opinion that it is.

Witness.—I have also another objection, that the certificate of the commissioners is no protection, because the commission must issue on an address of the two Houses of Parliament by the statute, and of that there is no proof.

His LORDSHIP.—I am of opinion that it is; and I am bound to state this for your own sake. If you persist in refusing to answer, it will be an offence of a very grave order, interfering with the due course of justice, and calling for a punishment of a very grave and degrading character. I state this that you may not persist in a course detrimental to yourself as well as injurious to the administration of justice.

After a pause,

The *Solicitor-General* repeated his question—"Did you receive any money from the defendant, Mr. John Barff Charlesworth, in the month of April, 1859?"

Witness.—I am very sorry to say I cannot make up my mind to answer that question.

His LORDSHIP.—You will do well to pause and consider the course you will take.

The *Solicitor-General* repeated the question.

Witness.—I must decline to answer that question.

His LORDSHIP.—I have cautioned you already; be careful what you do.

The *Solicitor-General.*—Do you refuse altogether to answer that question?

Witness.—Yes, sir (*a*).

(*a*) Both the Courts of Exch. and C. P., when the case was brought forward on motions for a *habeas*, on the ground, *inter alia*, that the *witness* was to decide whether the answer would criminate him: held, that it was for the *Judge*, under all the circumstances. So the Court of Q. B. held in the case of *Boyes*, *vide ante*, p. 158.

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The *Solicitor-General*.—Your LORDSHIP has heard my statement of this case, and must be aware not only how important, but how indispensable, the evidence of this witness is.

His LORDSHIP (to the witness).—Have you considered well that you are placed in no peril by answering that question? Do you still decline to answer?

Witness.—I decline to answer it.

His LORDSHIP (to the *Solicitor-General*).—Do you press the question?

The *Solicitor-General*.—Yes, my Lord.

His LORDSHIP.—Then, witness, I have no other course than to adjudge you guilty of a contempt of Court, of no ordinary character. Your evidence being material to the question before the Court, you, well knowing what would be its effect, have sought to withhold evidence necessary to the due administration of justice, and you have done so, imagining, perhaps, that you stand in no peril. What you have done is to thwart the due administration of justice, and I sentence you to be imprisoned for your contempt, unless sooner discharged by competent authority, for six calendar months, and to pay a fine of 500*l.*, and to be imprisoned till that fine is paid.

The witness was then delivered over into the custody of the governor of York Castle, and ordered to be confined among the first-class misdemeanants.

The learned *Solicitor-General* then said it was impossible to move a step in either case against the two Charlesworths without the evidence of this witness; but he asked his LORDSHIP not to go so far as to direct an acquittal for want of evidence, but simply to discharge the jury. In support of this request the *Solicitor-General* referred to the case of *Re Newton* (*a*), where a prisoner was

(*a*) 13 Q. B. 716.

committed for murder and indicted at the assizes, and the jury at the trial not being able to agree, retired, and after being locked up all night and still being unable to agree, were discharged.

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His LORDSHIP held that case not sufficient. That case and many others had recently been considered before him. The discretion of the Judge in such a case ought not to be exercised, except in case of necessity. In the case referred to the assizes were over, and it was necessary to go on to the next assize town. Was there any case in which it had been held that the Judge ought to exercise that discretion by reason of a witness breaking down?

There was a case where a prisoner fell down fainting, and was assisted out of Court (*a*); where a jury was discharged. He remembered a case which had occurred before Mr. Justice CRESSWELL, on the Northern Circuit, where a young girl, placed in the witness-box, fainted, and the case could not go on. He had the jury locked up for the night. He was disposed to discharge them, but had great doubts about it.

The *Solicitor-General* said there was a case of *Rex* v. *Stokes* (*b*), where a jury was discharged by the Judge on the ground of the absence of a witness for the prosecution, at the request of the prisoner's counsel.

His LORDSHIP.—In that case, after the prisoner was given in charge to the jury, and before anything was done, it was held, that if for any reason whatever a prisoner wishes it, the jury may be discharged.

Overend mentioned the case of an assault on a little girl, in which there was some enquiry as to her knowing the nature of an oath, and the trial was postponed till the child was better instructed, and submitted that it

(*a*) *Rex* v. *Streek*, 2 C. & P. 413.

(*b*) 6 Car. & P. 151.

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steam carriages and steam engines containing fire and igneous matter, and the defendants were also then possessed of a certain steam carriage and steam engine containing fire and igneous matter, which was then drawn and propelled in and along the said railway near to the said premises, and was then under the care and management of the defendants, who were then and there managing and conducting the same. Yet the defendants so carelessly, negligently and unskilfully managed and conducted their said steam carriage and steam engine, and the said fire and igneous matter therein contained as aforesaid, and used and applied so little care, precaution and skill in and about the keeping, holding and retaining of the said fire and igneous matter in and upon the said steam carriage and steam engine, and in and about the providing, applying and using the fit, proper and necessary means and appliances for keeping, holding and retaining the said fire and igneous matter from escaping, passing and flying from and out of the said steam carriage and steam engine, that by and through the carelessness, negligence and unskilfulness and improper conduct of the defendants in that behalf, and by and through the want of due and proper care, precaution and skill of and in the defendants in and about the keeping, holding and retaining the said fire and igneous matter in and upon the said steam carriage and steam engine, and in and about the providing, applying and using the fit, proper and necessary means and appliances for keeping, holding and retaining the said fire and igneous matter in and upon the said steam carriage and steam engine, and in and about the guarding, hindering and preventing the said fire and igneous matter from escaping, passing and flying from and out of the said steam carriage and steam engine, divers sparks and particles of the said fire and divers portions of the said igneous matter escaped, passed and flew from and out of the said steam carriage and steam engine of the defendants in and upon a certain

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heap of straw then being in and upon the said land near to the said premises, and by means thereof the said heap of straw then became ignited and set on fire, and by fire and flame thence issuing and arising, the said premises, whilst the same were so respectively occupied as aforesaid, and the reversion thereof respectively so belonged to the plaintiff, became ignited and set on fire, and were thereupon and by means of the premises wholly burnt, consumed and destroyed.

The only plea was that of not guilty.

The plaintiff was the landlord of premises called Moor Farm, in the parish of Swanbourne, in the county of Bucks, which were destroyed in the afternoon of the 2nd of May, 1860, by fire. The premises consisted of the usual farm-buildings and a rick-yard. The fire broke out in the rick-yard, in a stack of wheat-straw, which was distant forty-three feet from the defendants' railway. The general disposition of the premises, so far as relates to the rick-yard, was the same at the time of the fire as it was before the construction of the railway, but the stack of wheat-straw had only recently been placed where it then was.

Numerous witnesses were called on either side.

His LORDSHIP, in summing up, told the jury that, since the legislature had thought fit to authorize the use of locomotive engines on railways, the companies who under that authority use on their lines these engines, calculated as they are to interfere in some respects with the ordinary rights of enjoyment of property by others, are yet not responsible for the consequences of so using them, provided they are not guilty of any negligence, either in respect of the proper construction or the proper furniture of their engines, or in respect of the proper use and conduct of them when they shall have been so properly constructed or furnished.

That there would be two questions, therefore, for their consideration. First. Was the fire occasioned by a spark

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or cinder that was emitted from the defendants' engine? And, if so, was the emission attributable to any negligence on the part of the company or their servants, either in the construction, furniture, or condition of the engine, or in the use or management of it?

It must, therefore, be considered what would be negligence on the part of the defendants, for the consequences of which they ought to be held responsible. That, as to that, the defendants, in the construction of their engines, were bound, not only to employ all due care and all due skill for the prevention of mischief accruing to the property of others, by the emission of sparks or any other causes, but they were bound to avail themselves of all the discoveries which science had put within their reach for that purpose, provided that they were such as, under the circumstances, it was reasonable to require them to adopt. For example, if the danger to be avoided were insignificant, or very unlikely to occur, and the remedy suggested were very costly or troublesome, or such as interfered materially with the efficient working of the engine, then the jury would have to say whether it could reasonably be expected that the defendants should adopt such a remedy for such an evil. On the other hand, they were to consider the nature of the contrivances suggested, which principally consisted of the "bonnet" placed on the top of the chimney, or immediately inside of it, the perforated grating, the Venetian blinds and the American spark-catcher. Upon the question whether there was any negligence imputable to the defendants by reason of not having adopted any one of these remedies, these considerations were proper for the guidance of the jury. If, according to the suggestion of the plaintiff, they thought that with such an engine as that in question the risk of causing mischief by the emission of sparks was not improbable, and the danger of causing that mischief not unlikely to occur, then they would say whether it was not reasonable to require that the defendants should

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resort to some one of these protections, which were admitted by the defendants' witnesses to be useful in the case of an engine which does emit sparks which are likely to produce mischief. If they should, if the risk were considerable, and if the expense or trouble or inconvenience of providing a remedy were not great in proportion to the risk, then they would have to say whether the company could reasonably be excused from availing themselves of such a remedy, because it might to some extent be attended with cost or other disadvantage to themselves. On the first question these considerations were not of any very great importance; but if they found that question in favor of the plaintiff, namely, that the fire was caused by the engine of the defendants, then they would have to consider whether, in this case, there was negligence on the part of the defendants in not adopting some of the contrivances, and if they should also be of opinion that the escape of the sparks from the engine was fairly attributable to the want of that precaution being taken, then they would give a verdict for the plaintiff. If, on the other hand, they were of opinion, in accordance with the evidence of the defendants, that it was a highly improbable and most remote contingency that any lighted cinder could be ejected from an engine so constructed, then they would have to say whether it was reasonable that the defendants should be required to resort for a remedy to contrivances which, according to their evidence, would materially interfere with the working efficiency of the engine; and the jury would have to say whether any negligence was fairly imputable to the defendants by reason of having omitted to adopt a remedy under such circumstances.

The jury found a general verdict for the plaintiff.

BLISS *v.* THE LONDON AND NORTH-WESTERN RAILWAY COMPANY.

THE plaintiff in this case was the tenant of the premises which had been destroyed by fire, and the two actions

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were tried together by consent. But with reference to this case, his LORDSHIP was requested by the counsel for the defendants to take the opinion of the jury whether the plaintiff had not been guilty of negligence in placing the stack of wheat-straw so near to the railway.

His LORDSHIP said that he had no reluctance in proclaiming that he did not think the answer to that question was material to the case. It was contended that the plaintiff was aware that engines sent out sparks, and that they had proved destructive to agricultural produce and were likely to do so; and therefore it was on the plaintiff's part an act of culpable negligence to place his straw-stack in a situation exposed to danger. It would be desirable, however, for the purpose of future discussion, to answer the question, first, whether the plaintiff was guilty of culpable negligence in placing the straw-stack so close to the railroad? and if so, did that culpable negligence contribute to the accident?

The jury found a general verdict for the plaintiff in this case also, and said that he was not guilty of culpable negligence in placing the stack where it stood when the fire occurred.

O'Malley, Q. C., *Power*, Q. C., *Keane* and *Couch*, for the plaintiffs.

Bovill, Q. C., *H. Mills*, Q. C., and *Stephenson*, for the defendants (*a*).

(*a*) *Vide Vaughan* v. *Taff Vale Railway Company*, 28 L. J. Ex. 41.

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Cambridge, coram Williams, J.

REGINA *v.* RICHARDSON.

The prisoner was a clerk whose duty it was to receive money, on account of his employers, to pay wages and other claims out of it, and to remit the balance to their account at the bank. He had also authority, when the cash in hand was insufficient, to draw cheques, and in doing this the prisoner, with the sanction of the employers, did not always draw in favour of a particular creditor for the exact amount due to him, but drew in his own favour for such amount as he thought proper. On one occasion the prisoner drew a cheque for 11*l.* 10*s.*, which

THE prisoner in this case was indicted for forgery. It appeared from the evidence that he was a clerk in the employment of Messrs. Harrison, a firm carrying on business at Hull and Wisbech. The prisoner resided at Wisbech, and, together with one Carter, had the management of that part of Messrs. Harrison's business which was carried on there. An account was kept by the firm at Messrs. Gurney & Peckover's bank in Wisbech, to which account it was the duty of the prisoner to pay all sums not necessary for the current expenses of the concern; and upon which account the prisoner was authorized to draw when the cash in hand was insufficient to meet those expenses. In doing this the prisoner, with the sanction of his employers, did not draw always in favour of a particular creditor for the exact amount due to him, but drew in his own favour for such a sum as he required, or was supposed to require, for his disbursements, and paid the creditors out of it. On one occasion he drew a cheque for 11*l.* 10*s.*, which he entered in the books of the firm as having been paid to the Eastern Counties Railway Company for a debt due to them from the firm, but which cheque was, in fact, paid by the prisoner to his own landlord for rent due from himself.

he entered and took credit for as having been paid to a creditor of his employers, but which he, in fact, applied to his own purposes:—*Held*, that the prisoner, on this evidence, could not be convicted of forgery; inasmuch as, having a *general* authority to draw cheques, he did not necessarily exceed his authority when he drew the cheque; and that the criminal act, if any, was the subsequent appropriation of it.

The prisoner was also indicted for embezzlement; the evidence being, in addition to that already given, that it was the prisoner's duty to make out weekly accounts of the payments made by him, by entering them in a book, and adding them up at the end of each week. On three several occasions within six months the prisoner entered the payments made by him correctly, but in adding up the items made the totals 2*l.* greater than they really were, and took credit with his employers for the larger amount. These were the cases on which the indictment was founded. At the trial evidence was tendered that on a series of occasions before and after those mentioned in the indictment, precisely similar errors had been made by the prisoner, and advantage taken of them by him, and was objected to:—*Held*, that to explain motives and intentions this evidence was admissible.

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It was for forging this cheque that the prisoner was now indicted; whereupon

Power, for the prisoner, objected that this was no forgery, as the prisoner had authority to draw cheques.

WILLIAMS, J.—The cases come to the brink of this. In *R.* v. *Minter Hart* (*a*), the prisoner had authority to fill up the bill to a certain amount, but, having filled it up to a larger amount, was held guilty of forgery.

Power.—But in this case there is a *general* authority to draw, limited only by the amount of the balance at the bank.

WILLIAMS, J.—That is the difference. There was, no doubt, in this case a discretion vested in the prisoner to draw cheques, and so create a balance in his hands to meet the demands made upon the firm. The prisoner, therefore, did not necessarily exceed his authority in drawing for this amount, and the criminal act was rather the subsequent appropriation of it.

The prisoner being accordingly acquitted upon this charge, was then put upon his trial for embezzlement.

The indictment in this case contained three charges of embezzlement within six months, and, in opening the case for the prosecution, the evidence of embezzlement in these three cases was stated to be as follows:—That the prisoner, being in the position and conducting the business of Messrs. Harrison in the manner already described, it was his business to pay the labourers' wages, and make certain other payments, and to make out weekly accounts of all such payments, by entering them in a book and adding them up at the end of each week. On the 23rd of March, 1860, the prisoner's book showed a number of payments as having been made during the preceding week. All these payments had in fact been made and correctly entered, but the casting up, instead of showing a total of 20*l*. 12*s*. 8*d*.,

(*a*) 7 C. & P. 652.

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the real amount, showed a total of 22*l.* 12*s.* 8*d.*, for which sum the prisoner, in accounting with his master, took credit. In another week there was a precisely similar error of the same amount, for which the prisoner also took credit; and the same in a third week. These three cases were those on which the three charges of embezzlement contained in the indictment were founded.

O'Malley said that, anticipating that a defence would be set up that these errors were the result of accident, he should show a series of similar errors both before and after those which formed the subject of the present charges.

Power, for the prisoner, objected that this evidence was inadmissible, and that it ought not to be opened.

His LORDSHIP said that, as at present advised, he thought it admissible; and, if necessary, the question could be discussed when the evidence was tendered.

Evidence having been given in support of the three charges, mainly in accordance with the above statement, it was then proposed by the prosecution to prove the series of erroneous castings as above.

Power and *Naylor*, for the prisoner, argued that this could not be done. They contended that the general rule of law was, that the evidence must be confined to the point in issue; and the rule was founded on the principle that a man was not called upon to be prepared to explain any other transactions than those which were the subject of inquiry. This rule was always strictly applied in criminal cases, the only exceptions being those of a recognized kind, namely, on indictments for conspiracy, for uttering, or for receiving stolen goods. If this evidence were admissible in all cases those cases would not have been treated as exceptional, and the whole doctrine of election was based on the supposition that some such rule as that contended for exists. Similar evidence was very recently held inadmissible on an indictment for obtaining money by

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false pretences; *R.* v. *Holt* (*a*); in which case it was tendered for the same purpose as here, namely, for the purpose of showing what the intention of the prisoner really was.

WILLIAMS, J.—I am clearly of opinion that this evidence is admissible. There is no principle of law which prevents that being put in evidence which might otherwise be so, merely because it discloses other indictable offences; *R.* v. *Clewes* (*b*). Now it is clear that on this indictment the defence must be that these are mere errors in the castings; and such defence naturally arising, any lawful means may be resorted to whereby such defence may be anticipated, and proved to be ill-founded; and evidence which is admissible for such a purpose is not the less so because it tends to prove the commission of other felonies by the prisoner. To hold that this evidence is admissible is in accordance with the principle laid down in numerous cases, that to explain motives or intention evidence is admissible, although it does not otherwise bear upon the issue to be tried. This principle was recognized in *R.* v. *Oddy* (*c*), before the Court of Criminal Appeal, and also in a case which excited a great deal of interest at the time, that of *R.* v. *Geering*, a report of which will be found in 18 L. J., M. C. 215. There the prisoner was being tried for the murder of her husband by means of arsenic, and evidence was tendered that two other members of the prisoner's family had died by similar means, the object being to rebut the suggestion that the death which was the subject of inquiry was the result of an accident. The present Lord Chief Baron, with the concurrence of ALDERSON, B., and TALFOURD, J., admitted the evidence. This appears to me to be a similar case, and I think the evidence is admissible. I may add that, anticipating that this point

(*a*) 9 W. R. 74.
(*b*) 4 C. & P. 221.
(*c*) 2 Den. C. C. 264.

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would arise, I consulted the Chief Baron upon it, and he agreed with me in this view (*a*).

It was then shown by the production of the prisoner's books that there was a series of similar erroneous castings during a period extending from the 10th December, 1858, to the 24th August, 1860, and that in all these cases the prisoner had taken credit with his employers for the larger sum.

The prisoner was convicted.

O'Malley and *Hillam Mills* for the prosecution.

Power and *Naylor* for the prisoner.

(*a*) His Lordship refused to reserve the point.

Bury St. Edmunds, coram Pollock, C. B.

REGINA *v.* GARNHAM.

A prisoner cannot be convicted under 9 Geo. 4, c. 69, s. 9, for entering land by night armed for the purpose of taking game, whose object is to steal young pheasants which had been hatched by a hen, and which had not yet become wild.

THE prisoner, together with two other persons, was indicted under the 9 Geo. 4, c. 69, s. 9, for having, on the 16th of August last, entered land belonging to a Dr. Vernon, at Wherstead, near Ipswich, for the purpose of taking game. The prisoners were also indicted for resisting their lawful apprehension and for a common assault.

The evidence was, that Dr. Vernon's keeper was rearing pheasants from eggs, which had been collected and placed under a hen. There were three hens, each under a separate coop, and each of which had hatched a brood of young pheasants. These pheasants did not remain in the coops at night but roosted on the lower branches of some adjoining trees; they had not however yet become wild, but returned to and remained with the hens during the day, and were described by the witnesses for the prosecution as *tame* pheasants.

Markby for the prisoner objected, that on this evidence the prisoners could not be convicted of night poaching. Tame pheasants had been held to be the subject of

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larceny, *Reg.* v. *Head* (*a*); that is, they were the subject of property, whereas the game laws were founded on the hypothesis that the animals which they were designed to protect were not the subject of property, and were not protected by the ordinary rules of law.

Mayd for the prosecution contended, that even if these were considered as tame pheasants they were still "game" within the meaning of the statute.

POLLOCK, C. B. (after consulting WILLIAMS, J.)—I am of opinion that these pheasants, as long as they are under the care and protection of the hen which hatched them, are to be considered the *property* of the owner of the hen. Being his property they are not *game* within the meaning of this statute, for that term necessarily implies something which is not the subject of property. The prisoner must, therefore, be acquitted on the first two counts.

The prisoner was then convicted of a common assault.

Mayd for the prosecution.

Markby for the prisoner.

(*a*) 1 F. & F. 350.

Cambridge, coram Cockburn, C. J.

CRICK *v.* WARREN AND ANOTHER.

Lent Assizes.

The plaintiff having been sued by C. on a cause of action, as to which he would have had a cause of action over against the defendants, and they against other parties, and C. having been nonsuited in the former action, but having tendered a bill of exceptions, the plaintiff entered into a written agreement with the defendants, reciting that C. would consent to forego further proceedings if he was not called upon for costs, by the now plaintiff, on the nonsuit, and that they should pay an equal proportion of the costs, and that he should indemnify them from all further costs:—*Held*, that this was conditional on C.'s going no further, for that otherwise there would be no consideration; and that C. having moved for a new trial, the defendants were not liable.

DECLARATION, that on the 17th February, 1859, in an action against the now plaintiff by one Carter, as to a warranty of barley (bought by the plaintiff from the now defendants, who had bought of S., who had bought of W.), the then plaintiff had been that day nonsuited, and a bill

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of exceptions had been tendered: which it had appeared might not be prosecuted if the *now* plaintiff would not refuse any costs, and the defendants had incurred costs as to the barley: whereupon the defendants, the now plaintiff's vendees, and S. and W. (the previous vendees), requested the now plaintiff *not* to require Carter to pay any costs in the said action if he did not proceed further therein, and to put an end to litigation respecting the barley; and thereupon, on the said 17th February, 1859, by an agreement in writing between the plaintiff of one part, and the defendants (his vendors) and S. and W. (the previous vendors) of the other part; it was recited as above stated, and was mutually agreed between the said parties that they should pay in equal proportions all costs, charges and expenses incurred by the plaintiff with his attorney, respecting or in any way incident to the said action, and all costs and charges incurred by the defendants respecting the barley. And the plaintiff, on such payments being made by the parties thereto of the second part, undertook to indemnify them from all further costs relative to the said action.

Averments of performance by the plaintiff.

Breach: that the defendants have not paid their equal proportion, or any part thereof.

Pleas: 1. Denying the agreement.

2. That the agreement was subject to the express condition, that Carter should not proceed further with the action, or that the agreement should not take effect, and that he did, by moving for a new trial.

O'Malley for the plaintiff.

Couch and *Drake* for the defendants.

In 1857, W. had sold S. the barley on a certain warranty. S. sold it to the defendant, who resold to the plaintiff on the same terms. The plaintiff resold to Carter, who sold to Raper, and he to one Randall, a farmer, who

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sued him and recovered damages for a breach of warranty (*a*). Then Raper sued Carter on the same warranty, and Carter sued the plaintiff on the action above mentioned (*b*). When that action came on to be tried the plaintiff Carter was nonsuited, and on the same day the agreement in question was entered into, which was put in, and was as declared upon.

The plaintiff's bill of costs amounted to 278*l.*, and he had demanded three-fourths of it from the defendants, but a new trial having been moved for and refused, they disputed their liability on the ground of the alleged condition, that there should be an end of further litigation, having been broken, as it was admitted it had been.

COCKBURN, C. J.—The question turns entirely on the construction of the written agreement, which had better be reserved, but on which, I am of opinion, against the plaintiff, and direct a

Verdict for the defendants (*c*).

(*a*) 27 L. J., Exch. 266.

(*b*) 28 L. J., Exch. 238.

(*c*) With leave to the plaintiff to move the Court to have power to amend the plea if necessary, and *O'Malley* obtained a rule in the Exchequer, against which cause was shown on three grounds:—1, that the agreement was conditional on the nonsuit being acquiesced in; 2, that, if not so, there was no consideration for the promise by the defendants; 3, that it was in the nature of an agreement, by which the debt due from Carter to Crick for costs was to be taken on the defendants, and so was bad for want of consideration. And the Court held, that the agreement was clearly conditional on there being no further litigation, and that in that sense only could it be good, as it could not be taken as a guarantee of Carter's solvency. And they discharged the rule in T. T. 1860. *Preston* v. *The Liverpool Railway Company*, 25 L. J., Ch. 421, was cited.

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MIDLAND CIRCUIT.

Nottingham, coram Williams, J.

SEARSON *v.* ROBINSON.

Summer Assizes.

A defendant who had taken a farm under a person in possession, and claiming as devisee under a will, and had paid for manure, &c. under a valuation, according to the custom:— *Held*, liable for the value to the plaintiff, who had afterwards taken out letters of administration, the will having turned out to be invalid. But *held* liable only in *trover*.

ACTION by the plaintiff as administrator of one Jackson.

The first count was for money payable to the plaintiff as administrator, for having relinquished and given up to and in favor of the defendant, and at his request, the benefit and advantage of work done and manure bestowed in and about the preparing of ground for sowing of seed, &c.

Second count: for goods sold, &c.

Third count: in trover.

Pleas: never indebted, not possessed, and not guilty.

The particulars claimed 40*l.* for 200 loads of manure in the farm-yard of defendant when he took it, and divers sums for manure in certain fields, also for "loading and spreading" manure; in all, 177*l.*

Macaulay and *Bristow* for the plaintiff.

Mellor and *Hayes*, Serjt., for the defendant.

The deceased had died in January, 1854, possessed of a farm in which he had a leasehold interest, and leaving upon it a large quantity of dung, in heaps, which, by the custom of the country, was to be consumed upon the land.

A female named Radbourne had then entered on the farm under an alleged will, and was in possession of it as apparent owner. In the spring of 1854 she sowed the crops, and in the autumn of 1854 she reaped the crops, and there was a certain quantity of fresh straw, &c., then made.

In November the defendant took the farm under her, without any agreement in writing, but under an arrange-

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ment for a yearly tenancy, he paying her the usual tenant-right. In January there was a valuation between them to the amount of 62*l.*, including several "heaps of dung" (the dung then remaining on the farm), and also "loading and spreading" manure, and a "quantity of manure made from last year's produce," about seven loads, in the yard. The defendant had paid the amount of this valuation to Miss Radbourne, and she afterwards had a sale on the premises.

The valuer employed was called, and said he had valued it at 62*l.*, which was the full value. He stated that the custom of the country was to value only the manure derived from the last year's produce, as otherwise the land would be robbed; that the only tenant-right which would come to the deceased would have been the wheat sown in November, and the manure, &c., and that no benefit would come to the tenant coming in after Michaelmas, the whole of the crops having been reaped. The defendant had paid his rent to Miss Radbourne for two years.

In 1856 the will was set aside, and in 1857 the plaintiff took out letters of administration. This action was begun in August, 1859. There was at the first trial, before POLLOCK, C. B., no distinct evidence as to what quantity of dung remained on the farm when the defendant took it as tenant, and there was evidence for the plaintiff that there were 200 loads of manure on the farm when Jackson died, and about 150 loads when the defendant took it. The defendant was called to disprove this, and to prove his payments to Miss Radbourne, which were objected to but received.

Hall, the valuer, was also called for the defendant, and gave the evidence above stated, and swore that there were only seven loads of new manure.

POLLOCK, C. B., on the former trial, had held that the plaintiff was not entitled to recover on the first count, as there was no evidence of a contract; nor on the count for

manure sold, &c., as Miss Radbourne had acted and claimed adversely to any administrator, claiming as executrix and legatee; that Miss Radbourne was a disseisor, and that the defendant could only be liable in trover. That for manure *spread*, and thus annexed to the soil, the heir not the administrator was entitled to sue; that if the defendant had acted honestly he would be entitled to the verdict.

There was a verdict for the defendant, but this was set aside, and a rule for a new trial granted on condition of striking out the first count.

The cause was now re-tried on similar evidence, and

WILLIAMS, J., told the jury that the plaintiff was entitled to recover, as the personalty vested in him by relation on his obtaining letters of administration (*a*); and the only question was as to the amount.

Verdict for the plaintiff, 40*l.* (*b*).

(*a*) *Foster* v. *Bates*, 12 M. & W. 226.

(*b*) *Mellor*, in Michaelmas Term, 1860, obtained a rule to set this verdict aside, on the ground that no action was maintainable by the administrator in respect of manure valued and paid for upon a customary valuation to the outgoing tenant before letters of administration, and that there was no conversion, or that payment according to the custom was a discharge, &c. But the rule, upon argument, was discharged. See *Goldy* v. *Goldy*, 26 L. J., Ex. 29; *Tharpe* v. *Stallwood*, 5 M. & Gr. 760.

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HOME CIRCUIT.

Chelmsford, coram Wightman, J.

FORD v. LACY.

Lent Assizes.

Repute that a river was the boundary between two counties, *held*, some evidence that the land on one side of the existing stream belonged to the county on that side. Evidence that the plaintiff took the crops of grass, and that defendant grazed the aftermath: *Held*, rather consistent with the ownership of the land being in the plaintiff than the defendant.

TRESPASS: for breaking and entering a piece of land on the west side of the river Lee, in the parish of Walthamstow. The venue was in Essex.

Plea: not possessed, and soil and freehold in the defendant.

The case for the plaintiff traced title down to his landlord by deeds, describing the land as part of the soil of the river, which bounds Essex and Middlesex, and overruns the land at times, which is low and swampy.

The evidence for the plaintiff also showed, by parish perambulations, that the land was in Walthamstow.

And witnesses for the plaintiff stated as matter of repute that it was always deemed to be in Essex.

There was a good deal of ambiguity raised by cross-examination, as to whether the whole of the river formed the boundary, or the middle of it, or what was the original bed of the river.

Lush, for the defendant, objected that there was no evidence of the venue; but

WIGHTMAN, J., ruled that there was evidence.

Lush then went into evidence in support of a case founded on an enclosure act, which authorized an allotment of lands in the parish of Edmonton, in the county of Middlesex, and produced old maps to prove that the *locus in quo* was in that parish and county. But some of the witnesses for the defendant admitted that the place was in Essex.

The defendant was called, and stated that the plaintiff had

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cut the grass for thirty years past, until June, and that then he, the defendant, grazed it until the wet season begun.

WIGHTMAN, J. (to the jury.)—It is for you what the evidence really comes to as to the boundary; and whether, if the river was the boundary, what was the boundary. Is the place in the county of Essex? Is it the land of the plaintiff? The defendant's own evidence show that he cut the crops, and the defendant's own case is quite consistent with the plaintiff's, for the land might be in the plaintiff's possession and be his landlord's, and yet the defendant might be entitled to a right of grazing on it.

1. Is the land in Essex? 2. Has it been in the possession of the plaintiff? 3. Is it the land of the defendant's landlord?

Verdict for the plaintiff.

Hawkins and *Garth* for the plaintiff.
Lush and *Clark* for the defendant.

REGINA *v.* DARE.

Essex Lent Assizes.

On mandamus to the lord of a manor to admit trustees of a building society, interested as mortgagees, the return setting up a forfeiture for permissive waste, but the tenement having since been rebuilt:—*Held*, that the question was, whether the lord had a right to seize, and it was left to the jury whether, when the tenant who had mortgaged was admitted, the premises were in such a ruinous state as not to be fairly repairable: or whether he had delayed repairing for an unreasonable time.

MANDAMUS. The writ (on the prosecution of William Smalley and others) was directed to the defendant as lord, and one Mitchell as steward, of a manor, and stated that the copyhold tenements were descendible according to the custom, and had been conveyed from one person to another on the surrender of the respective tenants thereof; that the prosecutors having become entitled to a certain piece of land formerly parcel of the waste soil within the manor, together with the cottages erected thereon, required to be admitted to the said premises, but that the defendant absolutely neglected and refused to admit them; and it claimed that the defendant forthwith admit the prosecutors to the said premises on payment of such fines, &c.

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Return: 1. Traverse of the custom as alleged.

2. That the prosecutors did not become entitled as alleged.

3. That the prosecutors never had anything in the estate except as trustees, and there never was any custom in the manor to entitle them as such trustees to be admitted.

4. That said M. never was steward for any other than a special purpose, namely, of admitting the prosecutors to certain other tenements.

5. That on the 7th February, 1854, one George Vile was seised in fee of the piece of land, with cottage on it, and was guilty of permissive waste prior to the 20th March, 1855, whereby the land, with the tenement thereon, became forfeited to the lord, and were seized according to the custom.

Pleas, taking issue on the traverses:

5. That the defendant well knew, at the time he admitted the said George Vile, that the premises were in a dilapidated state.

6. That the said George Vile, within a reasonable time, and before the said land became forfeited, erected on the said piece of land, on the site of the said cottage, another cottage of much greater value, whereby the lord was greatly benefited.

Replication: 1. Taking issue.

2. That the said George Vile, after receiving notice from the lord, wilfully let the cottage remain in a state of dilapidation for an unreasonable time, and thereupon the same became and were duly forfeited. Issue.

Hawkins and *Hannen* for the prosecutors.

Lush and *W. Williams* for the defendants.

The prosecutors were trustees of a benefit building society.

George Vile having purchased of one Deemer, the copyhold tenant, his interest in the premises in question, out of monies obtained by advance from the society, was in

February, 1854, admitted tenant on Deemer's surrender, and assigned to the prosecutors by way of mortgage for those advances. There was evidence that G. Vile knew that the cottage required repair when he took the surrender, but that he allowed it to remain out of repair until 20th March, 1855, on which day the lord seized the premises as forfeited for waste; a notice of the seizure being fixed on the cottage directed to him.

Vile wrote to the bailiff excusing his neglect, and stating his intention to repair. Some time afterwards he pulled down the premises, and commenced building other cottages now on the land.

The bailiff gave him notice not to build on the land, the premises having been forfeited. But the cottages were completed through advances made by the society, without notice of the forfeiture, and secured by a new deed of assignment dated 27th December, 1855. There was evidence that the cottages, as rebuilt, were better than those which were there before. On the other hand, it was admitted that the original buildings were out of repair as above stated.

The prosecutors had applied to be admitted, but the defendant Dare claimed the premises as forfeited.

There was a great deal of evidence as to whether, when Vile took the premises, the cottages were repairable, or in such a state that they could not reasonably be repaired, and were uninhabitable.

Lush contended that the prosecutors had no estate or interest, and were not damnified; but

WIGHTMAN, J.—That is not material here. The question of fact is, whether the lord had a right to seize?

At the close of the evidence,

WIGHTMAN, J. (to the jury).—The questions for you are,

1. When Vile was admitted were the premises in such a ruinous state that they could not be repaired?—(Yes.)

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2. Did Vile, when he took possession, *know* that the cottage was out of repair?—(No.)

3. Was he required by the lord to repair it?—(No.)

4. Did he neglect to do so for an unreasonable time?—(No.)

The jury found a

Verdict for the prosecutors.

Maidstone, coram Erle, C. J.

Kent Lent Assizes.

TRAILL AND ANOTHER *v.* GIBBONS.

In an action against a surety on an equitable plea founded on the non-execution of the security by a co-surety:—*Held*, that there must be evidence of an agreement by the plaintiff with the defendant that such co-surety should execute, or that the defendant executed on the faith of the other's doing so, and where the proposal of another surety came from the plaintiffs, and was not at the time made a condition by the defendant, the defence failed.

DECLARATION on a covenant by defendant to pay to the plaintiff 500*l.* on a day passed.

Pleas: 1. *Non est factum.*

2 (for a defence on equitable grounds). That the deed, before and at the time of the defendant's making the same, was made between Thomas Randall of the first part, William Bennett, the defendant, A. Payne and T. Nixey of the second part, and plaintiffs of the third part; and it was agreed by and between the plaintiffs and the defendant that if Thomas Nixey did not execute the deed, the defendant should not be liable to perform, and should become discharged from performing, the said deed. That the defendant made the deed on these terms, and that Thomas Nixey had not executed it (*a*). Issue.

Hawkins and *Mathew* for the plaintiffs.

Chambers and *Robinson* for the defendant.

The plaintiffs were trustees of a society to which Randall had applied for an advance of 500*l.*, on the security of the defendant, with Bennett and Payne. The society sent a letter, in the usual form, to the defendant, telling him that he had been proposed as surety, with Payne and Bennett, and desiring to know if he consented, and if so, that he

(*a*) See, as to this kind of plea, 29 L. J., Exch. 369; *et vide ante*, p. 298.

would furnish the names of two referees, as to his responsibility. The defendant, in answer, consented, and gave the names of his referees. On inquiry, it appearing that Payne was hardly sufficiently responsible, the name of Nixey was proposed to and accepted by the society, in *addition* to the other sureties. The transaction was arranged at Slough, where Nixey lived, by one Crook, the agent of the society there. The loan not being repaid, and the sureties being resorted to, Nixey denied that he had executed the deed, or authorized its execution on his behalf, and it was clear that the actual *signature* was not his. The deed was executed by *Randall* on the 25th November, 1859, in *London*.

Crook was called for the plaintiffs and produced a document dated the 24th November, on one side of which was a memorandum of indemnity by Payne and the defendant to Nixey if he executed the deed, and on the other side was the following:—"In consideration of Gibbons and Payne's indemnity, I agree to the proposal, and you may sign for me.—T. NIXEY." Crook swore that this was signed by Nixey, and that, acting thereon, he affixed his name to the deed.

Chambers objected that the authority ought to have been by deed; but

ERLE, C. J., held the document admissible, as it might be material for another purpose.

The defendant was called and swore that he had not *signed* the indemnity (which did not purport to bear his signature), nor had seen the document on the occasion alluded to; that he was told that Nixey would sign the deed, and that he would not himself have signed had he not believed that Nixey had done so, and that he did not know until some time afterwards that Nixey had *not* signed. He admitted, however, that *he* had not *required*

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that Nixey should join, but that he only had heard that the *society* had required it.

ERLE, C. J. (to the jury).—It may be taken that the deed was *executed.*

Then as to the equitable plea. It states an *agreement* with the defendant that Nixey should sign the deed as co-surety with him; that the society should procure him to execute it, and that if they should not do so the defendant should not be liable. Has such an agreement been proved? The *lender* is usually the party who requires an additional surety, and so it seems to have been here. Still it may be sometimes for the interest of a surety to say, "unless you get co-sureties to join with me (*a*), I will not become surety."

And that is the defence set up here. Has it been proved? The evidence is very slight of any such agreement with the defendant. The defendant himself does not say that *he* required that Nixey should join, but merely that he knew that the *society* had required it. Did the defendant require it for his own benefit or security, or was there any agreement or understanding on his part, as a condition of his own execution, that Nixey should join? Does it appear that the defendant, before he signed, looked to Nixey at all? On the contrary, he says he did not know until some time afterwards that Nixey had *not* signed. As to Crook's signing for Nixey, it was a mere error, and in law there was no authority to do so. But the defendant could hardly have signed on the *faith* that Nixey would sign.

Verdict for the plaintiffs.

(*a*) Against whom he would be entitled to sue for contribution. *Kemp* v. *Finden*, 12 M. & W. 421.

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Maidstone Crown Court, coram Wightman, J.

REGINA *v.* GODDARD.

Kent Lent Assizes.

On an assignment of perjury by a defendant in a bastardy case, that he had *never* kissed the prosecutrix, &c.: *Held*, that the question of materiality was for the jury.

PERJURY. The assignment of perjury was, that at a certain hearing before the magistrates on a charge, &c. (as to whether the prosecutrix had a bastard child by the defendant), it became material to inquire "whether the defendant had *ever* kissed the prosecutrix or had familiarity with her (*a*); and that the defendant swore he had *never* kissed her, &c.

Barrow for the prosecution.

Robinson for the prisoner.

In June, 1860, the prosecutrix, one Mary Huntley, made an information against the prisoner that she was the mother of a bastard child by him. She stated that she went into the service of his father in April, 1858, left in May, 1859, and was delivered in July, 1859, the prisoner having been at his father's while she was there. Her evidence in chief was:—"The defendant came into my bedroom, and on three occasions I had been in my bed, &c.; on the *second* occasion, T. J. came in, and I scratched the defendant's face, he was then trying to kiss me, and had his hand about my waist. I had not been at his father's above a month when he began to take liberties with me."

The defendant was called by his attorney in answer to the charge, and being examined gave evidence, which was read by a witness, who had taken it down in the affirmative form in the usual way:—"I *never* had any connection

(*a*) Supposing this to be too large, so that on the record it did not appear that the question was, or at all events *might* be, material, the indictment would be bad, as where it alleged that it became material to inquire whether the defendant had *touched* the prosecutor, and that he swore she had embraced him, and put her arms round him, the indictment was held bad, as the materiality of the *evidence* did not appear. *R.* v. *Michol*, 1 B. & Ald. 21.

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or familiarity with her: I *never* kissed her or had my arm around her waist."

Robinson objected, that the evidence was not material, as it was far too wide in the form in which it was given; it could not be material whether the prisoner *ever* kissed the girl—for instance, while she was a child.

Barrow proposed to show the questions put by the defendant's own attorney, which might make the answers material (*a*), and

WIGHTMAN, J., assented to that course.

Barrow then recalled the witness, who produced the minutes of the defendant's evidence, but he could not recollect the form of the questions.

Robinson then pressed his objection, and

WIGHTMAN, J., retired to consult ERLE, C. J.; and on his return, declined to stop the case.

At the close of the case,

WIGHTMAN, J. (to the jury).—There cannot be a conviction for perjury unless the falsehood of the testimony is proved in substance by two witnesses. As to a great part of the defendant's evidence, of course this would be from the nature of the case impossible. And then the question arises, whether the parts of his evidence which are assigned as perjury were material to the investigation. It seems to me that they were so, but that is for you. Were they material and wilfully false?

Verdict, not guilty (*b*).

(*a*) For the question might have been limited, and the answer reasonably taken with reference thereto, would be material. Thus the question might have been, "While the girl was at your father's, did you ever kiss her, &c.," or the last previous question might have been pointed to that period.

(*b*) See the very similar cases, *Reg.* v. *Bennett*, 2 Den. C. C. 241; *R.* v. *Lavey*, 3 C. & K. 26.

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Kingston, coram Wightman, J.

ELECTRIC TELEGRAPH COMPANY *v.* MOORE.

Surrey Lent Assizes.

In an action against assignee of a lease, the locality of the premises not being stated in the declaration, the question of venue does not arise at the trial on a denial of the lease. Some only of the lessees having executed the assignment, but the defendant and another assignee having executed, and the other having entered :— *Held*, that defendant, on a plea in bar denying that the estate of lessees had come to him, was liable as assignee. And the joint assignee having entered and occupied with defendant's privity, *held*, also, that he was liable for use and occupation.

ACTION against the defendant Moore and another, one J. T.

Declaration, that the plaintiffs by deed demised to eight persons named, for seven years, from 25th March, 1858, at a yearly rent, which the lessees covenanted to pay.

Averment, that all the interest of the lessees by assignment thereof, came to and vested in the defendant and one J. T., and that during the term and since the assignment, and while the defendant and said T. continued such assignees, two quarters' rent were in arrear.

[Count for use and occupation (*a*)].

Pleas : 1. That there was no such deed of demise.

2. That the residue to come and unexpired in the premises did not come to and vest in the defendant.

[3. Never indebted (*b*)].

Lush and *Cohen* for the plaintiffs.

Bovill and *J. Brown* for the defendant.

The demise was of premises in the City of London. It was by the "Electric Telegraph Company," to eight persons, lessees. The Company's Act, 1853, enabled them to use either that title or the "Electric and International Telegraph Company."

The indenture of assignment (16th March, 1860) was by and between *seven* of the lessees and the two defendants, who had executed the deed, reciting the lease to the *eight*, and that the *seven* assigned "all the estate, &c. of *them*,

(*a*) This count was added on the commission-day by order of ERLE, C. J., on the application of *Cohen* for the plaintiff, who stated that there was to be a defence, on the ground that all the eight lessees had not executed the assignment, and that the defendant had actually occupied.

(*b*) Added in consequence of the count for use and occupation, *vide supra*.

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the said, &c. (naming the *seven*) of and in the demised premises."

Covenant by the *seven*, that they had full power to assign, but only *five* had *executed*.

In March, 1860, one T. took possession of the premises, and a quarter's rent was received from him; when more rent became due, the plaintiffs had letters from the defendant Moore, describing himself as "tenant." But there was no evidence of payment of rent by Moore, and his letter was to the Electric and *International* Telegraph Company.

Bovill objected to this, but

WIGHTMAN, J., overruled the objection, as the amalgamated company were to exercise the powers of the said company or "either of them."

Bovill then objected that the venue should have been in London, as the premises were there, and the action against the assignee was local. It did not appear on the declaration but in evidence, and the objection equally arises, for the deed being produced shows that the premises are in London, and that does not support a declaration with the venue Surrey.

WIGHTMAN, J.—The declaration does not allege that the premises are in Surrey, so the objection does not arise in evidence. Before the Common Law Procedure Acts you might have craved oyer of the deed, set it out and demurred; you could not have raised the point at the trial. The Common Law Procedure Act has not altered the law in that respect (*a*). The objection is not available here.

Bovill then put in an agreement, not under seal, by which two of the lessees on the 29th February, 1860, pro-

(*a*) The defendant might have set out the deed as a plea, or pleaded that the premises were in London (see C. L. P. Act, 1852, s. 55; Finlason's C. L. P. Acts (ed. 1860), p. 84, citing *Sim* v. *Edwards*, 23 L. J., C. P. 229), or might have applied to compel the plaintiff to amend his declaration (*Ibid.* p. 83).

fessed to let the premises to the defendants for seven years, the defendants agreeing to take an assignment of the lease under which the parties professing to let held; and in case the assent of the Electric Telegraph Company should be obtained, then, on the execution of that assignment, the lease hereby granted to be considered at an end.

WIGHTMAN, J.—Not being under seal, it is void as a lease by the 8 & 9 Vict. c. 108. It is a mere agreement.

Bovill.—Nevertheless, as the defendants paid rent under this agreement, they were tenants under it from year to year, their interest only being liable to be determined on the due execution of the assignment by the eight lessees, which never *was* executed. Therefore, either the defendants are not assignees at all, or, as *five* only of the lessees assigned, they are assignees only of five-eighths of the lessees' estate and interest, and in either view the first count fails.

Lush, on the latter point, cited *Heap* v. *Livingstone* (*a*), to show that the defendant should have pleaded in abatement, or was estopped from raising the objection; and as to the other point,

WIGHTMAN J., said:—The *company* were no parties to this agreement. They claim by the assignment. Then there is the count for use and occupation, on which there is evidence.

Bovill.—As to that the defendant cannot be liable to the plaintiffs, being an *underlessee*. Moreover, there is a lease by deed (*b*).

WIGHTMAN, J.—But your case is, that the defendants did not hold under that lease.

Bovill.—There is no other agreement with the *plaintiffs*.

(*a*) 11 M. & W. 896.

(*b*) *Gibson* v. *Kirk*, 1 Q. B. Rep. 850.

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WIGHTMAN, J.—There is evidence for the jury. Where the tenant is *lessee* by deed, use and occupation does not lie (*a*).

Bovill then proposed to call the defendant Moore, to show that he did not know that the assignment had not been executed by all the lessees.

WIGHTMAN, J.—But *he* executed it.

Bovill.—Still he did not know that the *lessees* had not executed, and he executed on the faith of their doing so.

The defendant Moore being called, said, he originally took the premises under the agreement which had been put in. He had paid no rent, nor knew that T. had paid any. The assignment had been executed subsequently by five of the lessees, and he had never had any other interest in the premises save such as might arise under those two documents. At the time the letters were written he was not aware that the assignment had not been executed by all the lessees. At the time he executed the deed it was pointed out that two names were wanting, but it was said that they could join. He had not been party or privy to any payment of rent, nor had he occupied the premises in any way after May, 1860; and up to that time he had only been there as secretary; after that time he believed T. had possession. He had written to T. as *his co-tenant*, to pay the rent at Michaelmas.

WIGHTMAN, J.—Occupation by a co-tenant is sufficient to sustain use and occupation (*b*). There must be a verdict for the plaintiff.

Bovill.—On what count?

(*a*) *Gibson* v. *Kirk*, 1 Q. B. 850.

(*b*) See *Christy* v. *Tancred*, 7 M. & W. 127. See also *Glen* v. *Dungey*, 4 Exch. 61, where two sign an agreement to become tenants, and *one* enters under it, it may be presumed he entered for both, and use and occupation lies against the two. See also *Wheatly* v. *Boyd*, 7 Exch. 20; *Finlay* v. *Bristol and Exeter Railway Company*, 7 Exch. 409.

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Lush proposed to take it on the *first*, with leave to move to enter it on the second, if the defendant should move.

WIGHTMAN, J.—Let it be so.

Verdict for the plaintiff.

PAYNE *v.* REVONS.

Surrey Lent Assizes.

Defendant having caused a warrant to be issued against plaintiff for getting from him a chaise on false pretences, in the way of references to third persons, of whom he had not inquired, and on which the jury found he had not in fact relied:—*Held*, that there was no reasonable and probable cause, although they found he had acted *bonâ fide*, in regard to the Larceny Act, and *semble*, there was evidence of malice.

ACTION for maliciously, and without reasonable and probable cause, causing a warrant to be issued against the plaintiff on a charge of obtaining property under false pretences, whereby he was arrested, &c.

Plea: not guilty.

Parry, Serjt., and *M'Donnell*, for the plaintiff.

M. Chambers and *Raymond* for the defendant.

The question raised was as to reasonable and probable cause; and the contest was as to what had really passed; the evidence of the plaintiff and the defendant as to the transaction being contradictory.

The plaintiff had got the defendant to let him have a chaise of his, telling him that he was known to one Coomb and one Mrs. White.

The defendant's story was that the plaintiff referred to Coomb as knowing him to be respectable, and represented that Mrs. White was likely to *purchase* the chaise.

The plaintiff had not paid for the chaise, and had soon after gone through the Insolvent Court.

Coomb was called, and said he *had* known the plaintiff for some years.

It did not appear that before getting the warrant the defendant had *inquired* either of Coomb or Mrs. White as to the truth of plaintiff's representations. He charged the plaintiff with obtaining the chaise under false pretences.

The 9 Geo. 4, c. 30, was relied on by the defendant.

WIGHTMAN, J. (to the jury).—1. Did Payne say he knew a Mrs. White who would purchase the chaise?

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2. Did the defendant part with the chaise because he believed that Mrs. White would purchase it, or because he relied on Payne's paying for it?—(The latter.)

3. Did Payne say that Coomb knew him?—(Yes.)

4. Did he also say that Coomb would satisfy the defendant as to his responsibility?—(No.)

5. Did the defendant really believe that he had good grounds for charging Payne with obtaining goods by false pretences?—(Yes.)

6. With reference to the statute, did the defendant act *bonâ fide?*—(Yes.)

The jury answered to these questions, as above, and also,

1. That Payne said he knew a Mrs. White, who he *thought* would purchase the chaise. 2. The defendant parted with the chaise believing that Payne would pay him. To the other questions as above stated; whereupon,

WIGHTMAN, J., ruled, that there was no reasonable and probable cause, and left the case to the jury.

Verdict for the plaintiff (*a*).

(*a*) The Q. B. granted a new trial, but only as *against* evidence in regard to malice, and that question not having been put to them.

HOPKINS *v.* WANOSTROCHT.

Surrey Lent Assizes.

In an action for a wrongful dismissal of a servant, who had been retained under an annual salary, but had assented to a proposal not to be paid further salary until works should be resumed, which had not in fact been resumed:—*Held*, that it was for the jury whether the original contract had been put an end to, and if so, the defence arose under a plea of rescission.

ACTION for wrongful dismissal of the plaintiff from his employment by the defendant. The plaintiff claimed two quarters of an annual salary.

Pleas: 1. Denying the contract.

2. That the plaintiff had not done all things necessary to entitle him to his salary.

3. That before breach the contract was mutually rescinded. Issue.

Parry, Serjt., and *Russell*, for the plaintiff.

Bovill and *Murray* for the defendant.

The plaintiff had been retained by the defendant at an annual salary as alleged.

In June, 1859, the defendant wrote to the plaintiff: "Our friends request us to curtail our expenditure during the time our works are in abeyance, and have particularly called attention to your salary, which they say, during the suspension, ought not to be charged, as there is nothing to call for your labours. We hope you understand this, and we hope shortly to recommence our works."

The plaintiff subsequently gave this receipt:—"Received from Messrs. Wanostrocht & Co. 50*l.* for a quarter's salary ending 30th June, 1859, being, for the present, the last, or until the works shall be resumed."

The works had *not* been resumed; and the plaintiff, finding they were *not* to be, had in April, 1860, claimed "the usual notice."

WIGHTMAN, J. (to the jury).—The *contract* is proved as laid. As to the *second* plea, there was nothing for the plaintiff to do. As to the *third*, there was not necessarily an absolute rescission of the contract, but only a temporary suspension. There should have been a plea of substituted agreement (*a*). It is said that the plaintiff was not to be paid unless the works were resumed. But it is plain that both parties hoped that they *would* be. Therefore the questions for you are these:—

1. Was the contract *rescinded* as to any salary subsequent to June, 1859, and absolutely put an end to?

2. Was he retained after that only in *case* the works should be resumed?

3. Did the defendant in effect give notice to the plaintiff in June, 1859, to terminate the original contract, and did the plaintiff accept such notice?

(*a*) See *Taylor* v. *Hilary*, 1 C M. & R. 741.

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The jury answered all these questions in the affirmative; whereupon

WIGHTMAN, J., directed a

Verdict for the defendant (*a*).

(*a*) Supposing the original agreement to have been put an end to, the question would be, whether there had been any substituted agreement to pay the plaintiff? which, in effect, the jury negatived; *Lamburn* v. *Cruden*, 2 M. & Gr. 253. Then, supposing the first agreement to have been put an end to, it would be of course only a nice question of pleading, whether the defence did not arise under a plea of rescission; for substitution is a rescission or a condition of substitution, and here the substituted agreement was on a condition, viz., resumption of the works, which never in fact took effect; so that, in the result, it really came to an absolute rescission.

Coram Erle, C. J.

RAYSON *v.* WHITE.

Surrey Lent Assizes.

In detinue for goods deposited as security for a note, plaintiff not allowed at close of case to raise a question as to the want of presentment.

DETINUE for goods.

Plea: that they were deposited by the plaintiff with the defendant as a security for a note, to which the names of the plaintiff and his father were attached. Issue.

Garth for the plaintiff.

Murphy for the defendant.

At the close of the case, the contest having been as to the property in the goods and the terms of the deposit, &c.,

Garth, for the plaintiff, applied for leave to amend, by adding a replication that the note had not been duly presented; but

ERLE, C. J., declined to allow it, as "the real question in controversy between the parties" down to that moment, had been whether "the goods had been deposited" as a security for the note.

Verdict for the defendant.

1861.

Judges' Chambers, coram Willes, J.

DOBSON *v.* EASTON.

Hilary Term.

Judgment by default in an action against a married woman alone: —*Held*, irregular.

SUMMONS to set aside a judgment and execution, on the ground that it was obtained against a married woman, and without service of the writ.

On the latter point, however, the application failed on the facts; but on the former, the affidavit of defendant being distinct and unanswered.

WILLES, J.—Unless the plaintiff can adduce evidence that the husband was not alive the judgment was irregular.

No such evidence having been adduced,

Order made on payment of costs (*a*).

Kelly for the plaintiff.

Butler Rigby for the defendant.

(*a*) The nonjoinder of the husband might be matter only for plea in abatement (*Dalton* v. *The Midland Railway Company*, 13 C. B. 474), and even where the coverture is in bar, if not *pleaded*, of course it cannot be raised as a defence to the action. Even when a married woman is sued *along* with her husband, and is taken in execution on a judgment obtained against both, she is entitled to be discharged (whether or not *he* is taken), unless she has separate property (*Ivens* v. *Butler*, 26 L. J., Q. B. 145). Here, however, the judgment was set aside as *irregular*. The husband would be entitled to bring error *coram vobis*, 4 East, 520; and see 8 T. R. 302.

Coram Wightman, J.

REGINA *v.* BOWLES.

Hilary Term.

The trial of an indictment for obstructing a highway, not postponed at the instance of the defendant until the trial of an *action* by the prosecutor against him for injury by reason of the obstruction of the same highway.

INDICTMENT for obstructing a highway, found at the Middlesex Sessions, and removed by *certiorari* into the Queen's Bench.

Summons on the part of the defendant to show cause

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REGINA v. BOWLES.

why the trial of the indictment should not be postponed until after the trial of an action brought by the prosecutor against the defendant for obstructing the highway, alleging it, in the notice of action which had been given under the statute, as a public highway and as a private way. The action had not gone beyond the writ and notice, and the notice contained other grievances besides the obstruction of the highway, one of them being an interference with ancient lights.

Keane, for the prosecutor, showed cause. The application is unprecedented, but we are willing to postpone the trial of the *action* until after the trial of the *indictment*.

Coleridge, for the defendant, in support of the summons. The object is that the defendant may give his evidence in the *action*, and both the parties, at the first trial of the question, be put on an equality.

Keane.—He does not swear that he intends to give evidence. There are other causes of complaint in the *action*.

WIGHTMAN, J. (after consulting HILL, J.), was of opinion that a person ought not to be harassed with two proceedings, and when he is so, the Court have a right to determine which of the two proceedings shall be pursued, so as to place the parties in a position of equality. Here, however, being an allegation of a *public* nuisance, and the indictment founded only on *that*, it is only a public grievance by reason of a private wrong. Therefore, if the prosecutor would undertake not to proceed in the *action*—so much of it as related to the right of way—no order should be made.

Keane assented to this, and, therefore,

No order.

1861.

Coram Hill, J.

MORLEY *v.* THE GREAT CENTRAL GAS COMPANY.

Hilary Term.

In an action against a gas company for negligently allowing the escape of gas from their main through an open window into the plaintiff's premises, where it ignited and exploded and caused a fire which consumed them:—*Held*, that, under sect. 58 of the C. L. P. Act, 1854, inspection by the defendant of a model made for the plaintiff from memory after the destruction of his premises, which had since been rebuilt, ought not to be allowed.

THIS was an action for negligently allowing the escape of gas into the premises of the plaintiff, where lights were burning, so as to cause its ignition and explosion, and thereby a fire, which consumed the plaintiff's premises, and other adjoining premises, the owners of which had also brought actions.

Summons on the part of the defendants for liberty to inspect and take a copy or pattern of a certain model of a house partly consumed by fire, but subsequently, and before this action, rebuilt. The application was supported by an affidavit, which stated that there had been a trial in an action against the defendants for negligence in fixing a service-pipe in their mains, by which they were distributing gas, whereby the gas escaped into the basement of the present plaintiff's premises, and being ignited and exploded, set them on fire, and so caused the destruction of the premises of the plaintiff, and also of the plaintiff in the former action. That in the former action the verdict passed for the defendants, but that subsequently a rule *nisi* for a new trial was obtained. That on the application for that rule the model in question was produced by counsel for the then plaintiff, and an application was made to the then plaintiff for liberty to inspect and take a copy of the model, and that his answer was that it had been lent to him by the *now* plaintiff. And that an application had been made to the *now* plaintiff and refused. That it would be material at the trial of the cause to ascertain the exact condition of the internal part of the premises, in order rightly to estimate certain alleged "in-draughts" or currents of air which the plaintiff contended ought to have been taken into consideration by the servants of the de-

1861.

MORLEY v. THE GREAT CENTRAL GAS COMPANY.

fendants when they laid on the service-pipe, the trench for which, it was suggested by the plaintiff, led the gas from the main up to the basement window, left *open* at the time of the escape of the gas from the hole in the main. That the defendants had no knowledge of the interior of the premises, and that the plaintiffs had constructed the model from their own recollection, or that of their servants, workmen and builders.

Keane, for the defendants, in support of the application, contended that as, in point of fact, the model was the only evidence that now existed as to the state of the house before and at the time of the explosion, the house itself having been destroyed and rebuilt, the application came within the provision in the Common Law Procedure Act of 1854, sect. 58 (*a*), for an inspection of any real or personal property.

J. Simons, for the plaintiff, *contrà*. There is no authority for such an application, and it amounts in fact, either to an inspection of the plaintiff's own evidence, or to an inspection of what is not evidence, and in either view it is not within the section, neither is it the subject-matter of the action.

(*a*) "Either party shall be at liberty to apply to a Court or a Judge for a rule or order for the inspection by the jury, or himself, or by his witnesses, of any real or personal property, the inspection of which *may be material to the proper* determination of the question in dispute . . . on such terms as the Court or Judge may direct." This provision may be applied at *any time* before trial; it is not restricted to the subject-matter of the action, nor, *in express terms*, to property of the opposite party, if in his possession, or to property in his possession, provided he may be supposed to have control over the party who is in possession; as in *Irwin* v. *Lever*, *vide ante*, p. 294; and the cases on the subject, both at law and in equity, have gone, upon this or a similar provision in the Patent Act, to the length of the most liberal construction. See *Twentyman* v. *Barnes*, 2 De Gex & J. 225; and other cases cited, Finlason's C. L. P. Acts (Ed. 1860), 202. And see *Patent Type Company* v. *Lloyd*, 29 L. J., Ex. 207, and *Owen* v. *Nickson*, 30 L. J., Q. B. 125.

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HILL, J., said he would take time to consider and consult the other Judges. Next day the learned Judge stated that they were of opinion that

No order in this case should be made (*a*).

(*a*) This decision illustrates the ancient principle of law, constantly applicable to the construction of statutable provisions, in terms giving an absolute discretion; "though the power is at the discretion of the Judges, yet ought they to be limited and bound with the rule of reason and law." Per WILLES, J., citing Lord Coke, 30 L. J., Mat. & Prob. 45. The *power* here is absolute; but, as the model was merely made from memory, to assist the plaintiffs in the getting up their own case, and might be erroneous, they might not offer to use it in any way in evidence, and its inspection by the opposite party might give an unfair advantage, while it could not be used as evidence by the defendant, for it was merely in effect a statement to the plaintiff by his workmen.

Coram Wightman, J.

RINGROSE *v.* BLIZARD.

Hilary Term.

ACTION for goods sold.

Plea (*inter alia*): that the defendant had accepted for and on account of the plaintiff's claim a bill of exchange payable to order, which had been *lost* by the plaintiff.

Under sect. 87 of the C. L. P. Act, 1854, a plea of a bill given for and on account of the claim, and *lost*, struck out on plaintiff's giving an indemnity to the defendant.

Summons on the part of the *plaintiff*, under sect. 87 of the Common Law Procedure Act, 1854 (*a*), to have the plea struck out, on the terms of tendering an indemnity to the defendant, to the satisfaction of the Judge or a Master.

WIGHTMAN, J.—Upon a liberal construction of the pro-

(*a*) In case of *any action* founded upon a bill of exchange, or other negociable instrument, it shall be lawful for "the Court or a Judge to order that the loss of such instrument shall not be set up, provided an indemnity is given to the satisfaction of the Court or Judge, or a Master, against the claims of any other person upon such negociable instrument." The section is enabling and remedial, and of course ought to be construed as largely and liberally as possible; and perhaps the action may be deemed to be, in one sense, founded upon the negociable instrument, when the *question* on the action is so, and depends on its existence and its nature.

1861.

RINGROSE v. BLIZARD.

vision in the statute, it may be held to include such a case as this, which certainly comes within its equity and spirit; therefore

Order made.

Digby Seymour for the plaintiff.

Beresford for the defendant.

Coram Willes, J.

1860.

Vacation.

SMITH *v.* YOUDE.

A charging order under 1 & 2 Vict. c. 110, s. 14, will be made absolute, notwithstanding proceedings against the trustees of the fund by creditors, and there being no other fund for payment of costs.

IN 1857 the plaintiff recovered a judgment against the defendant for 15,000*l.*

In 1859 a relative of the defendant died, and bequeathed to the defendant a life interest in a sum of about 50,000*l.* consols, which sum was standing in the names of trustees in the Bank books.

Between 1859 and July, 1860, creditors of the defendant adopted various proceedings, and three Chancery suits were pending, to which the trustees were parties.

Plaintiff had obtained an order *nisi* under 1 & 2 Vict. c. 110, ss. 14 and 15, and 3 & 4 Vict. c. 82, charging the 50,000*l.*

E. Chitty now showed cause, and contended that the trustees had a lien on the fund for the enormous costs to which the proceedings of the various creditors of the defendant had subjected and would subject the trustees, and that this lien was paramount to the right of a judgment creditor in a proceeding of this nature, and there was no other fund for payment of costs.

W. Pearce, in support of the order, argued that there could not be any doubt of the plaintiff's right to have the order made absolute; and that, as to the trustees' claim or lien for costs, the proviso at the end of the 1st section of 3 & 4 Vict. c. 82, enables a Court of Equity, notwithstand-

ing the charging order, to direct payment of dividends and transfer of stock in any manner that Court may think proper; and with this view the Judge concurred, and made the

Order absolute.

1860.
SMITH v. YOUDE.

Coram Bramwell, B.

PEARCE *v.* WATKINS.

1861.
Hilary Term.

An order will not be made for the sale of goods seized in execution under sect. 13 of the C. L. P. Act. 1860, except under special circumstances, nor, *semble*, unless the value of the saleable goods is shown to exceed the amount of the secured debt.

SUMMONS, by an execution creditor under sect. 13 of the Common Law Procedure Act of 1860 (*a*), for an order directing the sale of certain goods of the judgment debtor's claimed by a third party under a bill of sale.

In support of the summons, there was an affidavit of a judgment debt for 300*l.*, and of a claim to all the goods under a bill of sale for 5,000*l.*

It was not shown that the selling value of the goods was above 5,000*l.*

Edye, for the judgment creditor, in support of the summons, urged that the Act gave the power to order a sale, and that it was reasonable to do so, for it was unjust that the claimant should neither realize his security nor allow any other creditor to do so (*b*).

(*a*) When goods or chattels have been seized in execution . . . and some third party claims to be entitled under a bill of sale or otherwise to such goods or chattels, by way of security for a debt, the Court or a Judge may order a sale of the whole or a part thereof, upon such terms as to payment of the whole, or part of the secured debt or otherwise, as they shall think fit, and may direct the application of the proceeds of the sale in such manner and on such terms as to them may seem just.

(*b*) But at law the sheriff has no right to seize goods on which a third party has a lien, *Rogers* v. *Kennay*, 15 L. J., Q. B. 38; and the equity is only to the surplus, if any. And in equity, an equitable mortgagee has a prior claim to a creditor under a subsequent judgment, *Whitworth* v. *Gaugain*, 1 Ph. 728; and see *Watts* v. *Porter*, 21 L. J., Ch. 553.

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Gibbons, contrà, urged that it would be most unreasonable and unjust to order a sale of property which, for anything that appeared, was not more than sufficient, even in real value, to satisfy the security; and which, if sold at a forced sale, might not be half sufficient, so that there would be great loss to the claimant and no benefit to the judgment creditor.

BRAMWELL, B.—No doubt the section in *terms* gives power to make the order, but it must be reasonably construed, and a just discretion must be exercised before the order is made (*a*). It seems to me that no sufficient grounds are here made out for the order, and that it ought not to be made except on special gounds. The claimant has a right to "nurse his security," and I see no reason to interfere with that right. Therefore

No order (*b*).

(*a*) "As Lord Coke says, with reference to the power given to the Commissioners of Sewers to act *juxta discretiones vestras*, yet their proceedings ought to be limited and bound with the rule of reason and of law," 5 Co. 100; 10 *ibid.* 140. WILLES, J., 30 L. J., Prob. & Mat. 45.

(*b*) In equity, *puisne* incumbrancers, whether by mortgages subsequent to the first, or creditors by subsequent judgments (which give a lien on real estate), are entitled to redeem if they can; but, subject to that option, the first mortgagee may foreclose against them all; *Stead* v. *Banks*, 5 De Gex & Sm. 560; 22 L. J., Ch. 208; *Ford* v. *Chesterfield*, 16 Beav. 516; 22 L. J., Ch. 630. And first mortgagee has a right to a decree for sale or foreclosure, though a subsequent incumbrancer desires to redeem, if the *value* of the property does not appear; *Wickham* v. *Nicholson*, 19 Beav. 38. Under the 15 & 16 Vict. c. 86, s. 48, the Court of Chancery has power, by a provision somewhat similar to that in the C. L. P. Act, to direct a sale of mortgaged property; but that power being substituted for that of foreclosure, is deemed subject to the same rules of principles; *Wayn* v. *Lewis*, 22 L. J., Ch. 1051. On the same principle it should seem that the provision in the C. L. P. Act should not be arbitrarily exercised, but by analogy to the rules of equity, as it is a provision interfering with a clear *legal* right; and it is not to be presumed that the legal title is to be controlled except on equitable principles. Those principles appear to require that the applicant should show that the value of the goods is more than sufficient to cover the amount for which they are security, and that

the sale may be made without injury to the value of the security; for in equity a sale is never forced, and successive periods are always allowed to redeem. This appears, indeed, from the terms of the clause itself, which seems to have been carefully framed with reference to those principles of equity; for it provides that the Judge may order payment of the *whole*, or part, of the secured debt, which implies that it is made to appear that the value of the goods are *more* than sufficient to satisfy the whole, or the Judge cannot have that option; and, though he may order payment only of a *part*, that may be deemed to be with reference to *other* securities, which may be held for the same debt. Even in bankruptcy, secured creditors may realize their securities, and then prove for the residue, *Ex parte Penfold*, 4 De Gex & Sm. 282; and a mortgage of goods, or a lien, is recognized, supposing it not *per se* an act of bankruptcy, and possession taken before the bankruptcy; *Ex parte Sparrow*, 2 De Gex, Mac. & Gor. 907; *Ex parte Bell*, 1 De Gex, 577; 17 L. J., Bank. 9. And even if the *mortgagee* becomes bankrupt, a sub-mortgagee cannot have an order for sale without an enquiry as to *amount*, *Ex parte Mackay*, 1 M., D. & D. 550. And if, as a sub-mortgage, the security proves deficient, the assignee has a priority for the sum he has advanced, *Ex parte Berridge*, 3 M., D. & D. 464. The Bankrupt Act, s. 184, expressly reserves the rights of creditors with liens; and s. 141 gives the assignees only the *same rights which the bankrupt* would have, *i. e.*, in law or equity. And as to the discretion of the Court to order a sale of securities, see *Ex parte Smith*, 1 V. & B. 518; 2 G. & J. 105. Hence it seems as creditor he cannot sustain this application for sale, except by offering to pay the debt; or by showing that the value far exceeds the debt.

HARTLEY *v.* SHEMWELL.

MARPLES, Garnishee.

Vacation after Hilary Term.

Although the judgment debtor has been arrested, the debt is still garnishable. *Aliter* as to arrest of judgment *creditor*.

SUMMONS on behalf of Marples to attach the judgment debt for 37*l.* recovered by the plaintiff against the defendant. The affidavit of the claimant showed a debt of 67*l.* due to him from Hartley, as the costs of an interpleader issue on an execution by him against Shemwell, in which Marples had been claimant, and had succeeded in gaining a verdict.

The affidavit of the claimant did not disclose the fact that Shemwell had already been arrested at the suit of Hartley on the failure of the interpleader issue.

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HARTLEY v. SHEMWELL. MARPLES, Garnishee.

The learned Baron, in ignorance of the fact of the arrest on the 16th March, made the order asked for in these terms:—"That Shemwell, the garnishee, do forthwith pay to William Marples, the claimant, the sum of 30*l.* 5*s.* due from the said garnishee to the plaintiff in this action, in *part payment* of the sum of 67*l.* 1*s.* 6*d.*, the amount certified by the Master to be due from the plaintiff to the said William Marples under the order of interpleader."

On the 19th Shemwell took out a summons for his discharge out of custody, on the ground that he had paid his judgment debt to Marples. No affidavit of this was produced, and in point of fact it had not been paid otherwise than by being struck off the larger debt of 67*l.* due from Hartley to Marples; and an authority from Marples to the sheriff to release Shemwell was produced.

BRAMWELL, B., made the order in these terms:—"That on payment of 1*l.* 6*s.*, the plaintiff's costs of execution, to the plaintiff or to the sheriff on his behalf, the defendant be discharged out of custody of the sheriff as to this action; the sum of 30*l.* 5*s.*, being the amount of debt and costs in this action, having been paid by the defendant as a garnishee to Marples the claimant." The learned Baron at the same time declined to rescind his former order, although he observed that he was not sure that he should have made it had he been aware at the time that Shemwell had been arrested at the suit of Hartley; for it was at all events an arguable question whether, under such circumstances, the debt was garnishable. It is open, however, to Hartley to raise that question distinctly by an application to rescind the orders (*a*).

(*a*) In Easter Term, 1861, *Field* accordingly moved in Q. B. for a rule to rescind the orders on that ground; but the Court (COCKBURN, C. J., CROMPTON, J., HILL, J., and BLACKBURN, J.) refused a rule; holding that the debt *was* garnishable notwithstanding the arrest. The rule was that the orders be set aside, and that the plaintiff be at liberty to arrest Shemwell again, on the ground that the judgment debt was not garnishable at the time the garnishee order was made,

and *Jamaulde* v. *Parker*, Q. B., H. T., was cited, but the Court distinguished it, as there it was the judgment creditor who had been arrested, here it was the judgment debtor. See *Catlin* v. *Kernott*, 27 L. J., C. P. 187, as to discharge with the consent of the judgment creditor.

Coram Martin, B.

ANGUS *v.* SMYTHIES.
SMYTHIES *v.* ANGUS.

SUMMONS to set aside an order of reference and proceedings thereon, and to have the action referred to the Master.

After one of the parties to a reference has failed to attend a meeting, the arbitrator may, at the next, *without* a peremptory appointment, proceed in his absence.

The original order had referred the causes to an actuary, and he had acted under the order, and held two meetings, of which due notice had been given to Smythies, but he had not attended at either. The arbitrator on the *second*, without a peremptory appointment, went on in his absence, and appointed a *third* meeting, which Smythies had declined to attend, taking out this summons, on the ground that the arbitrator had proceeded improperly in his absence.

Edie in support of the summons.

Gibbons, contrà.

MARTIN, B.—The arbitrator was not bound to make a second appointment. It was his duty to go on as quickly as possible, in order to save expense to the parties. But if the other side do not object, the matter may be referred to the Master, on the terms of Smythies paying all the costs, and the fees of the present arbitrator. On those terms

Order made (*a*).

(*a*) See *Tryer* v. *Smith*, 27 L. J. Exch. 320.

1861.

Coram Martin, B. and Blackburn, J.

GOODRED *v.* SEALE.

Where there was a set-off on an attorney's bill, and the question of retainer might arise on many of the items, *held*, that the cause involved "matter of account," which could not be conveniently tried, and therefore that it must be referred.

SUMMONS to refer an action as involving "matter of account."

The action was for money had and received.

Set-off for work by the defendant as an attorney, and payment into Court.

Gibbons, for the defendant, in support of the summons. The items of set-off are numerous, and it is a question of amount.

Laxton, for the plaintiff, *contrà*. The retainer is not admitted, and that is the real question between the parties.

MARTIN, B.—Unless that is shown not to be so, the action cannot be compulsorily referred. The defendant has a right to have the question of retainer tried by a jury.

The summons was adjourned and came on again before BLACKBURN, J., with an affidavit on the part of the defendant that the work had been done by the defendant as attorney in several actions, and that he had likewise appeared for the plaintiff's brother, the plaintiff having undertaken a liability to pay costs, and the plaintiff disputed his liability as to many of the items.

This was uncontradicted; and thereupon

BLACKBURN, J., said, it appears that the question of retainer really arises on almost every item in the bill of costs, so that the cause "cannot be *conveniently* tried by a jury;" consequently, it had better be referred.

Order made.

1861.

Westminster, coram Hill, J.

MORRIS *v.* PUGH.

Hilary Term.

A discharge from custody under a *ca. sa.*, by an order of the Court of Insolvency, being defeated by a misdescription of date of the judgment debt, the mere notice to the creditor, and his non-appearance to oppose the discharge:—*Held*, no sufficient evidence of a *consent* to it.

ACTION on a judgment.

Plea: that the plaintiff had sued out a *ca. sa.* upon the judgment, on which the defendant had been arrested, and detained in prison until discharged under the Insolvents Act.

Replication: showing that the discharge had been fraudulently obtained, by misdescribing the judgment debt, and that the plaintiff had not consented to it. Issue.

It appeared that the debt was described as having arisen *before*, whereas it was *after*, the vesting order.

HILL, J., held that there must be a verdict for the plaintiff unless there was evidence of his consent to the discharge.

Hawkins urged that there was, as there had been notice to the plaintiff, and he could have opposed the discharge; but

Verdict for the plaintiff.

Huddleston and *Holl* for the plaintiff.

Hawkins for the defendant.

Coram Blackburn, J.

OSBORN *v.* THOMAS.

Hilary Term.

Where the owner of wine in warehouse had allowed a clerk to take out and show warrants in his own name, and the clerk had parted with them to the defendant, in whose hands they had been attached for a debt contracted by the clerk to the persons who sued out the attachment, and there was evidence of *collusion*:—*Held*, that the question was whether the property was in the plaintiff, the defendant not having really *relied on* any representation that it was in the clerk.

TROVER and detinue for five pipes of wine.

Pleas: not guilty, not possessed, and *non detinet*.

M. Chambers and *Joyce* for the plaintiff.

Ballantine, Serjt., and *Talfourd Salter*, for the defendant.

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OSBORN v. THOMAS.

The plaintiff was a wine merchant, and the pipes were at the London Docks warehouses, in his name, until June, 1860, when one Molloy, clerk to the plaintiff, showed the defendant warrants, in Molloy's name, and told him that he had them to sell. The defendant did not then buy, and the warrants were handed back to the plaintiff, indorsed by Molloy. In November, the warrants being still in the possession of the plaintiff, the defendant proposed to Molloy to get them, and that he, the defendant, should purchase. On the 13th November Molloy got the warrants from the plaintiff, giving him this receipt:—"Received from Mr. Osborn five warrants for five pipes of wine, which I undertake to return by two on Wednesday, or the money agreed on for them, viz., 146*l.*" The warrants were then handed by Molloy to the defendant, but he neither got the money nor returned them to the plaintiff. And on the 15th November the defendant received notice of an attachment, by virtue of an action against *Molloy* at the suit of one Hernaman, upon all goods which now have or which hereafter shall come into the hands or custody of the defendant.

The officer of the Lord Mayor's Court, who proved this, stated that it was competent for the plaintiff, by "bill of property," to assert his property in the goods, against the attachment, but that they would still be in the defendant's custody, and that the attachment did not prejudice the plaintiff's right.

For the plaintiff, Molloy was called, and both of them swore that the plaintiff had demanded the goods from the defendant.

For the defendant, Hernaman was called, and he and the defendant stated that on the 14th November the defendant had an advance of 40*l.* on a bill from Hernaman, and that he showed him the warrants, and that Molloy also had received from Hernaman money to the same amount on the bill. It appeared, however, that Hernaman

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OSBORN v. THOMAS.

made the advance and got the bill at half-past ten, and that before eleven he sued out attachment, the warrants having been just before shown to him.

Ballantine, Serjt., submitted that Molloy had been entrusted with the warrants, and held himself out as the owner, with the consent and sanction of the plaintiff; but

BLACKBURN, J., told the jury that the question was, who was the real owner of the goods. It not being denied that the plaintiff had demanded them of the defendant, that would be strong evidence to show that he had not lost his property in them. The holding out is not material, as it does not appear that the defendant put faith in it, but there is evidence that he and Hernaman were in collusion.

Verdict for the plaintiff.

Coram Erle, C. J.

WHITE *v.* BAYLEY AND OTHERS.

Hilary Term.

THIS was an action against W. Spurgin, S. Mills and others. The declaration stated that the plaintiff was lawfully possessed of a certain shop and premises, in which he had for a long time carried on and was carrying on the trade and business of a bookseller, and was then and there possessed of certain books, &c., yet the defendants broke and entered the said shop, &c., and ejected the plaintiff, and kept him ejected, and took possession of his books, and hindered him from carrying on his business, whereby he became bankrupt. Second count, for converting the plaintiff's books.

Pleas: 1. Not guilty.

2. As to the breaking and entering and taking possession, and keeping the plaintiff out of possession, &c., that the shop, &c. was not the plaintiff's as alleged.

3. Leave and licence.

The committee of a society having dismissed their manager, entered on and excluded him from a house they had put him into possession of and allowed him to occupy as such manager, and in which he had also been allowed to carry on his own business as a bookseller, and took possession of, but offered to return his stock, &c., which however he never had applied for:—

Held, that he could not sue them, either in trespass or trover.

1861.

WHITE v. BAYLEY and Others.

E. James, *Parry*, Serjt., and *Needham*, for the plaintiff.

Shee, Serjt., and *Watkin Williams* for the defendants.

It was opened for the plaintiff that the defendant Spurgin was and had been for thirty years chairman of a society for diffusing the doctrines of Swedenborg, and that the other defendants also were members of a committee of the society, of which the plaintiff had been manager, under the following arrangements :—

By the rules, the affairs of the society were to be conducted by a committee, consisting of *twelve* members, who should be elected at the annual general meeting, and they should elect a chairman, deputy chairman and secretary, and might appoint a *salaried agent or manager*. The property of the society should be vested in *four trustees*, who should be subject to the laws, rules and regulations of the society for the time being.

On the 6th July, 1854, the committee for the time being came to a resolution "that the person to be appointed" (manager) should have premises, rent and taxes free; that he should be allowed a per-centage on all books sold by him out of the society's stock, and also be allowed to carry on a retail business in other works for his own benefit.

One Wilkinson, the secretary, communicated this to the plaintiff (who had applied for the appointment), writing to him at the same time, on the part of the committee, to this effect, that they would guarantee him 150*l.* the first year, but that *afterwards* they would not propose to do more than free him from rent and taxes and give him the commission.

On the 13th July, 1854, the committee resolved that the plaintiff be elected the agent on the general terms mentioned in the above resolution, with such modifications as might be mutually agreed upon, and that he be requested to meet them to assist in selecting a house.

On the 25th July, 1854, the plaintiff attended the committee, when the resolutions above stated were read to him and assented to.

Some of the defendants were on this committee.

In January, 1855, the plaintiff was put into possession of a house by *the then committee, including some of the defendants,* and he was allowed to put his own name on the shop, as bookseller, and to carry on business both for the society and for himself. This was the house in question; and he so continued to carry on business there until the trespass complained of.

In the same year, 1855, the plaintiff was re-appointed by a resolution of the then committee in these terms:—"Another year's engagement was entered into, with a six months' notice of separation on either side."

In 1856 the appointment was renewed.

In 1857 it was likewise renewed, in these terms:—"That Mr. White be manager for the ensuing year, at a salary of 75*l.* a year, and *six months' notice of separation* on *either side.*"

In July, 1858, 1859 and 1860, his appointment was renewed in similar terms.

The plaintiff stated that during all this time he had occupied the ground floor as his shop and premises, and the upper part of the house as his dwelling, but the first floor was used as the meeting-room of the society. He sold books on his own account, and the defendants were among his customers.

On the 2nd August, 1860, the committee gave the plaintiff notice to leave, on account of his selling books of which they did not approve.

On the 8th November, 1860, at a meeting of the committee, *at which the defendants were present,* they gave the plaintiff a written dismissal, and also a written notice requiring him to give up possession of the premises, whereupon he retired and locked the door of the shop. Upon

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which they asked admission (*a*), which being refused, they had it broken into, expelled him from it, and seized and took possession.

On the 23rd November this action was commenced.

On the 26th November the plaintiff got possession again, but he said his business had been ruined in the meantime.

On the 19th December the defendants were reinstated under an order and injunction in Chancery.

They had written to him offering to allow him to remove his books and other property.

There had been no demand and refusal.

There was no evidence as to the persons in whom the legal title to the house was vested.

There was another action pending for the wrongful *dismissal* of the plaintiff.

Shee, Serjt.—There is no case. As to the goods, there is no evidence of conversion, and as to the house, the plaintiff was the servant of the defendants, and his possession was theirs; *Mayhew* v. *Suttler* (*b*).

E. James for the plaintiff. As to the goods, there was an unlawful taking of possession, and there had been a continued detention *before* the offer to return. As to the house, the plaintiff had exclusive possession of part of it for his own business. And there was no proof that the *defendants* had any right or title in the house.

ERLE, C. J.—There is no case to go to the jury. As to the *trespass*, the plaintiff came into possession under the defendants, and they put him, being in their employment, into the premises, the *possession* of which remained in them, and in which he had no *right* except by virtue of the contract of employment. No doubt it was part of that contract that he should carry on his own business on the premises, and under that *contract* he may have rights, but

(*a*) To which at all events they were entitled, as he had not *exclusive* possession.

(*b*) 4 E. & B. 347.

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his possession of the house was *theirs*, and when they entered these rooms he had no more possessory right there, as against *them*, than any other servant. He had no estate or interest as against the society, or those who let him into possession.

Then as to the goods, they were upon the premises, on which they had a right to enter, and there was no seizure or taking possession except by that entry. Nor was there any detention against the plaintiff, for the defendants offered to return them, and it was for the plaintiff to apply for them (*a*). On neither of the counts, therefore, is there any ground of action, and consequently there must be a

Nonsuit.

(*a*) *Burroughs* v. *Bayne*, 29 L. J., Exch. 185.

Coram Williams, J.

BUCKMASTER *v.* RUSSELL.

Easter Term.

ACTION on simple contract.

Plea: the Statute of Limitations. Issue.

Parry, Serjt., and *L. Kelly* for the plaintiff.

Karslake for the defendant.

"I am sure I don't owe it, but as you say I do, I am willing to pay so much *per annum*"—unaccepted:—*Held*, insufficient to take a debt out of the Statute of Limitations.

A letter in the following terms was given in evidence as an acknowledgment to take the case out of the statute:—

"I am sure my account was settled; but as you assure me it is not, I am willing to pay you 10*l.* a year: should this meet with your approbation you can write to me."

No answer being put in,

WILLIAMS, J., doubted whether this was sufficient, and after consulting the other Judges, held that it was *not* so.

Verdict for the defendant (*a*).

(*a*) A rule *nisi* granted, but *hæsitanter*.

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Coram Byles, J.

COTSWORTH *v.* SPOKES.

Hilary Term.

In ejectment, under C. L. P. Act, 1852, s. 210, for non-payment of rent, it must appear that half-a-year's rent was due at the time the *writ issued.*

EJECTMENT.

M. Smith for the plaintiff.

Prentice for the defendant.

The action was by landlord against tenant under the Common Law Procedure Act, 1852, sect. 210 (*a*), to enforce condition of re-entry for non-payment of rent.

The rent was 80*l.* a year, and three quarters being due a distress had been put in, under which *only* 27*l.* had been realized. The present action had then been brought.

Prentice, for the defendant, contended that under the statute (*b*) the plaintiff was not entitled to recover, as half-a-year's rent was not due when it was supposed the right of action accrued, viz., on the distress turning out to be insufficient.

BYLES, J., so ruled, holding that there was not half-a-year's rent due within the statute.

(*a*) Finlason's edit. (1860), p. 149.

(*b*) The words of the section are, —"In all cases between landlord and tenant, as often as it shall happen that one half-year's rent shall be in arrear, and the landlord . . . hath right by law to re-enter for the non-payment thereof, such landlord shall and may, without formal demand or re-entry, serve a writ of ejectment, &c. . . . and in case *it be proved upon the trial,* in case the defendant appears, that *half-a-year's rent was due before the said writ was served, and that no sufficient distress was to be found on the demised premises,* countervailing *the arrears then due* . . . then . . . the lessor shall recover judgment in the *same manner* as if the rent in arrear had been legally demanded, and a re-entry made, &c. &c. It should seem, that the "arrears then due" mean, the arrears remaining due when the writ is issued.

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NASH *v.* GRAY.

Hilary Term.

A tenant having made payments to his landlord, and also advances at his request to a firm of which he was a member, on account (as the tenant alleged) of rent not then due, *held*, that if the advances were made on account of the rent, they were an answer to an action for the rent by the landlord's executors.

ACTION by an executor for use and occupation.

Pleas: 1. Never indebted.

2. For a defence on *equitable* grounds, that the defendant had satisfied the claim by *payment* to the *testator*.

Coleridge for the plaintiff.

Pearce for the defendant.

The particulars claimed 130*l.*, a year's rent from Midsummer, 1859.

The testator died between that time and Michaelmas, when defendant left.

The plaintiff, the executor, called on the defendant in December, 1860, claiming a year's rent due at Midsummer in that year. The defendant denied that he owed it, and said he had paid *half* a year up to December, 1859, and had paid 32*l.* 10*s.* afterwards on account of the testator.

Pearce called the defendant, who proved payment of the whole amount claimed; part having been paid to the testator as *rent*, and the rest, in February and March, 1859, advanced at his request, and on an understanding that it should go against the rent. The testator died on 22nd June, 1859, largely indebted to the defendant. The defendant swore positively that the advances were against the rent, and produced his cancelled cheques given to testator's partner, which were put in.

Coleridge cross-examined to show that these advances were to the testator's *firm*, and on a different account from the rent.

Pearce referred to one of the cheques put in, and which bore at the back an indorsement by the defendant, confirming his statement that it was given as payment in advance of the rent.

Coleridge objected, that, though the cheque was in evi-

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dence, that did not make the defendant's own indorsement evidence as against the testator or his executor, it having been made when the testator was absent.

BYLES, J.—The cheque is *in* evidence, and in evidence for all purposes. How can I prevent the jury from seeing anything on it? What the indorsement amounts to is another question. It is a general rule as to all such instruments, that if put in they are evidence altogether, and taken as read. What the cheque *proves* is *payment*, but it is impossible for me to exclude what is upon it.

At the close of the defendant's case,

Coleridge said he did not dispute that the payments had been made, but that they were made on account of the *rent*.

BYLES, J.—It is a question of *appropriation*. There is a *technical* difficulty; for the plea is, that the payments were after the cause of action accrued, *i. e.*, *after* the rent became due. If the demise were under seal the difficulty would be greater; as it is, a parol contract may be varied by parol, and the rent made payable in advance. Or perhaps, to meet this difficulty, the plea is pleaded as an equitable defence. I will reserve the point, giving leave to amend in any way necessary to raise the defence. The question I shall leave to the jury is, whether the payments were appropriated, as the defendant has stated, to the account of the *rent*.

Coleridge went to the jury, contending that there had been no such appropriation, and that it was a case of cross-demand, on which the defendant must be content to recover out of the assets (*a*).

(*a*) If the rent had become due after the death of the intestate, the defendant could not have *set off* his payments (*Rees* v. *Watts*, 25 L. J., Q. B. 30), unless made by way of beforehand payment of the rent. The question whether he could set off, or whether he could plead payment, would have depended, in that case, on the same principle. Strictly speaking, the testator dying two days before Midsummer-day, the last quarter's rent became due to the executors.

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BYLES, J. (to the jury).—The plea is to be considered as amended so as to raise the real question; which is, whether the rent was *paid?* Or how much of it?

Verdict for the defendant.

WRIGHT *v.* CAMPBELL AND ANOTHER.

Hilary Term.

ACTION on a deed, whereby the defendant had covenanted with the plaintiff to repay him certain sums of money advanced to one B.

A plea of fraud to a bond or deed means fraud by which the defendant was misled and deceived in the actual *execution* of the instrument, not in any transaction which led to it.

Pleas: 1. *Non est factum.*

2. Fraud.

Huddleston and *Barnard* for the plaintiff.

Robinson for the defendants.

A clerk to the plaintiff, an attorney, proved that the defendants executed the deed, and read it.

Robinson cross-examined as to the transaction out of which the deed arose, and as to whether certain advances were really made.

BYLES, J.—The defendants having read it, and executed it, knowing its contents, surely, though you showed the transaction out of which it arose to have been fraudulent, yet in an action at *law*, on the *deed*, that would not be available as a *legal* defence.

Robinson said he should prove representations made by the plaintiff to the defendants that the deed, which the defendants did not understand the effect of, would not bind them at all.

BYLES, J.—That no doubt would be fraud, if it goes to this extent, that the defendants did not really know what they were signing, or that the effect of what they signed was misrepresented, which would come to the same thing. But it would not be competent, upon this plea, to enter

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into the transaction between the defendants and the plaintiff, and to show that the money was *not* advanced.

Robinson having cross-examined as to the circumstances of the execution,

Huddleston then called the plaintiff.

Robinson cross-examined as to the effect of the deed, which the witness admitted was to assign a certain fund belonging to the defendants as security for the money, *as well* as to covenant for its repayment.

BYLES, J.—That is not material, if the defendants understood what they were executing.

Robinson cross-examined as to certain representations to B. and to the defendants.

BYLES, J.—Is there any case since *Green* v. *Gosden* (*a*) upon the effect of this plea and in such an action?

Finlason, amicus curiæ, cited *Mason* v. *Ditchbourne* (*b*), as cited in *Feret* v. *Hill* (*c*).

BYLES, J., having read the case, declared that he should rule in accordance with it; that the plea of fraud, in an action on a specialty, was a kind of special plea of *non est factum,* and would let in evidence of fraud in regard to the actual execution of the deed, as its contents being misread or misrepresented; but that no other defence, founded on the nature of the transaction out of which it arose, was admissible or available.

Verdict for the plaintiff.

(*a*) 3 M. & G. 41. There it was held that a plea of fraud to a bill was not supported by showing that it was given for money lent in the name of a supposed company, which never existed. After that case it was held, in *Moens* v. *Heyworth,* 10 M. & W. 147, that, even in a case of *simple* contract, a collateral representation, to avoid it on the ground of fraud, must have been such as induced the party to *enter into the contract.*

(*b*) 1 M. & R. 460. On a plea that a bond was obtained by fraud, *held,* that evidence was not admissible to show that the defendant executed it with full knowledge of its contents, but in consequence of previous fraud.

(*c*) 15 Com. B. 597; *Canham* v. *Barry, ibid.,* S. P.

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RUSSELL *v.* SHINN.

Hilary Term.

When an apprentice has absented himself, the fact that the master declined to have any trouble taken to find him, and described him as worthless, though it will not sustain a plea of leave and licence, may be material in mitigation of damages, and the jury can only give the real value of his services up to the time of action.

DECLARATION, that, by an indenture of apprenticeship dated the 27th day of December, 1856, it was witnessed, *inter alia*, that William, the son of the defendant, did, with the consent of the defendant, put himself apprentice to the plaintiff as a carpenter and joiner, to serve him from that day for the term of five years; and the defendant, *inter alia*, bound himself by the indenture that the said William should during the term faithfully serve the plaintiff, and would obey his lawful commands, and should not absent himself from the plaintiff's service.

Breach: that the said William did not faithfully serve and obey, &c., but did absent himself from the said service from the 19th January, 1860, and thence hitherto, whereby the plaintiff has lost the advantages which would have accrued to him from the services of the said William, &c.

Pleas: 1. Denying the deed.

2. That the son did not absent himself.

3. That the son was absent with the leave and licence of the plaintiff. Issue.

The deed was entered into in the month of October, 1856. The apprentice left on the 19th January, 1860.

The plaintiff had repeatedly, before then, made complaints to the father, the defendant, that his son was a drinking, idle, worthless kind of fellow, whom he declared he would not keep.

The plaintiff called on the defendant soon after his son had gone away, as he said, to Plymouth, to enter as a ship's carpenter; and when the father asked, "Is he worth fetching back?" the plaintiff replied, "No, he is not worth his keep; let him have his fill." The father offered to go after him; but the plaintiff said it would be no use, repeating that the youth was not worth his feed. The son never returned.

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The action was brought on the 23rd October, 1860, eight months after the absenting.

Both parties appeared to have expected that he would return. According to his master's evidence, the youth earned 24*s.* a week for his master, and his keep cost about half that sum.

BYLES, J. (to the jury).—You must, as a matter of law, find for the plaintiff. The plea of leave and licence is not sustained. The action is not, however, a dissolution of the contract of apprenticeship, which continues until effluxion of time, in October next. The apprentice *may* come back to-morrow; and the master cannot, therefore, recover for mere *absenting* damages beyond the time of the action, as he may in the case of permanent injury; *Hodsoll* v. *Stallbrass* (*a*). The declaration itself, which states the plaintiff's complaint, is, that the apprentice absented himself "thence hitherto." The plaintiff cannot recover damages up to the end of the term, but only for the period from the absenting to the bringing of the action. But if the plaintiff afterwards assented to the absence, you can give no damages from the time of such assent. And in any view you may consider what was the value of the apprentice's services, which *might* be the difference between his earnings and his keep. As to that, however, you must look to the whole of the evidence, and especially to what the plaintiff said before and soon after the absenting, and say what was the real value of such an apprentice as he described.

Verdict for the plaintiff, damages one farthing.

Joyce for the plaintiff.

Parry, Serjt., and *Gibbons*, for the defendant.

(*a*) 11 A. & E. 301.

COX *v.* MATHEWS.

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Hilary Term.

If an apprentice, whose master's business lies in precious articles constantly lying about, is an habitual thief, the master may discharge him; and charges of theft made to his father will be privileged, but the master will be liable in slander for false charges made to third parties.

ACTION by an apprentice against his master.

The first count was as to the deed of apprenticeship.

Breach: that the defendant did not instruct.

Second breach: that, during the fourth year of the term, two weekly sums became due under the deed, which were not paid.

Second, third, fourth and fifth counts, complaining of as many slanders, charging the plaintiff with different acts of theft, and generally as a thief.

Pleas: 1. (To the first count.) Denying the breach.

2. (To the same, as to the *first* breach.) That during the time mentioned therein the plaintiff *absented himself* from the defendant's place of business, where he was bound to attend and be instructed by the defendant, and so *prevented* the defendant from instructing him.

3. (To the counts in slander.) Not guilty; and that the words spoken were and are true. Issue.

Shee, Serjt., and *G. Francis*, for the plaintiff.

Parry, Serjt., and *Kenealey*, for the defendant.

On the 29th June, 1857, the plaintiff put himself apprentice to the defendant as a watch-case maker for seven years from that date.

From the nature of the business, gold was continually lying about.

On the 12th November, 1860, the defendant gave the plaintiff a part of a gold watch-case to take to a person; and the plaintiff, when he returned, said he had lost it. The defendant then charged him with stealing it, dismissed him, and made the *other* charges mentioned in the counts for slander.

The plaintiff's father saw the defendant, and the charges were repeated to him; the *other* charges were then for the first time mentioned to him by the defendant, though the instances alleged went back to the first year of the term.

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The boy was absent several days afterwards, and the charges being persisted in, the present action was brought.

Some of the charges of stealing were to the father; but on other occasions the defendant had mentioned them to third parties.

The plaintiff was called, and denied the charges.

Parry, Serjt., cross-examined him as to the specific instances of theft alleged in the counts on slander, and also as to the watch-case, which was *not* mentioned specifically in the slanders set out.

At the close of the case for the plaintiff,

Byles, J., stated there were *five* charges of theft in question, but not the watch-case.

Parry, Serjt., called the defendant, and went into *all* the charges, including that as to the watch-case.

Byles, J., suggested that there should be a plea to the *whole* declaration, setting up all six instances of theft, and such a plea was accordingly added; though

Shee, Serjt., objected, as it might tend to instigate and incite the defendant's witnesses to drive home a charge of felony, which they had not intended at the trial to persist in; but

Byles, J., said that could not be fairly urged in this case, as it clearly appeared that the charge of stealing the watch-case had been made *at the time* (*a*).

At the close of the case, the evidence as to all the charges resting on the testimony of the defendant or his son,

Byles, J. (to the jury).—On *all* the counts the substantial question now is, whether the charges of felony are true. If any of them are false, then, from the nature of

(*a*) See *Lynn* v. *Comer*, *ante*, p. 244. The general form of the pleas *might* have prejudiced the defendant, perhaps, in not giving him notice what charges would be relied on; but the witnesses were all in Court.

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the case, and the fact that they rest so much on the testimony of the defendant, great discredit will be cast on the others.

If the plaintiff was in the *habit* of stealing, as the defendant alleges, the defendant would not be bound to have him in his shop to instruct him, as there was gold lying about, and constant opportunities of stealing. The case for the defendant is, that the plaintiff *was* an habitual thief, and had been so for years.

The statements to the father would be privileged; not so as to third parties.

On the count for not instructing and not paying the two weekly sums, the damages would not probably be severe; but the real question of damage is on the counts for slander, on which, if you find for the plaintiff, you will do well to give large damages.

Verdict for the plaintiff, 200*l.* (*a*).

(*a*) The amount claimed.

LEADER AND ANOTHER *v.* RHYS.

Hilary Term.

FIRST count: *detinue* for two piano-fortes.

Second count: money payable for hire of goods, &c.

Pleas: 1. (To first count.) *Non detinet.*

2. Not possessed.

3. As to 6*l.* 10*s.* 6*d.*, part of claim for money payable, payment into Court.

4. To residue, never indebted.

Replication, joining issue on first and second pleas, and taking money out of Court in satisfaction on third plea; *nolle pros.* as to fourth plea.

The particulars under the money count claimed 6*l.* 10*s.* 6*d.* for hire of pianos, &c. to the 8th December last.

Parry, Serjt., and *L. Kelly*, for the plaintiff.

Where goods are hired at a certain rate per month, and are to be returned "whenever demanded," the owner may demand them back in the middle of a month, and, on refusal to return, may maintain detinue.

In detinue, damages are only recoverable for the detention prior to the issuing of the writ.

Any subsequent detention must be made the subject of a second action.

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Collier and *Stephenson* for the defendant.

It appeared that the defendant had, for some time past, been the proprietor of an evening entertainment at the Prince of Wales's Hall, Regent Street, and for the purpose of the entertainment had hired pianos of the plaintiffs from time to time. The last hiring was of the two pianos in question, and took place on the 8th October, 1860. The defendant on that day agreed for the hire with one of the plaintiffs; the rate being three guineas per month, and paid the first month's hire in advance. The pianos were sent to the Prince of Wales's Hall on the same day, and on their arrival the defendant signed the following paper:—

"London, Oct. 8, 1860.

"Nos. 331, 379.

"Received on hire from Messrs. Leader & Cock, of 63, New Bond Street, two piano-fortes at three guineas per month, exclusive of carriage, which will be charged to and from; *and I undertake to deliver the same whenever they may demand it*, or to their order only.

"(Signed) C. HORTOR RHYS.

"Witness, J. DUFFIN."

This paper, with the exception of the names, &c., was printed, and was contained in a book consisting of forms of similar documents, which it was the plaintiffs' practice to get signed by their customers when pianos were hired.

About the latter end of November the plaintiffs applied to the defendant to return the pianos, but he objected to do so; and on the 7th December they wrote to defendant, informing him that they should send for them on the following day, which they did. The defendant, however, refused to deliver up the pianos, alleging that he had hired them for three months. Upon this the present action was brought; the writ being issued on the 10th December. On the 1st January the defendant returned the pianos, stating that the three months had then expired (the defendant, as was supposed, reckoning the time as lunar months, but plain-

tiffs reckoning it as calendar). The 6*l.* 10*s.* 6*d.* claimed in the particulars included the hire to 8th December, and also the balance of a former account.

One of the plaintiffs was examined, and deposed that nothing was said at the time of hiring as to its being for three months, or for any other definite term.

BYLES, J., intimated that the question appeared to be purely one of damages, the pianos having been given up, and that the amount could only be nominal; viz., for the interval between the 8th December, the date of the writ, and the 10th, when they were given up.

Collier asked for a nonsuit; submitting that the hiring, if not for three months certain, was from month to month; that the payment of the first month's hire in advance made it so, and that the hiring could not be put an end to in the middle of a month, which he contended the plaintiffs had endeavoured to do.

Parry, Serjt., and *L. Kelly* argued, 1st, that the written undertaking must be taken as decisive of the terms of the hiring; that it clearly gave plaintiffs an unfettered power of putting an end to the contract at any time, at all events, at any time after the expiration of the first month; that the case was analogous to that of contracts between master and servant, in which a power to determine the service might be exercised in any part of the year (*a*); that by the usage of the piano trade (if evidence thereof were admissible), contracts of hiring were determinable at any time: that the defendant, by claiming to hold the goods for a longer term than they were hired for, entitled the plaintiffs to determine the bailment *instanter;* and that the pianos had actually been sent for at the expiration of the second month.

(*a*) *Aliter*, in general, as to power to determine *a tenancy* by notice to quit, see cases cited in Cole on Ejectment, 31; see distinctions, *Doe* d. *King* v. *Grafton*, 18 Q.B.496; *S. C.* 21 L.J.(N.S.), Q. B. 276.

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2ndly. As to the damages. The plaintiffs are entitled not only to damages for the two days' detention between the 8th and 10th December, but also for the subsequent detention until the goods were given up. This case does not come within the ordinary rule which limits damages to matters arising before the commencement of the action. The action of *detinue* is substantially for the recovery of the goods themselves, and contemplates a detention continuing subsequently to the writ, the plea being in the present tense *non detinet;* and the damages are merely accessory. The damages in detinue for goods are similar in their nature to interest for the detention of a debt, which is always allowed to be recovered down to the time of trial (*a*). The case of *Williams* v. *Archer*, in error (*b*), shows that it is the practice in assessing damages in detinue to take into consideration matters which have occurred pending the action (*c*). It is believed that it is the practice in detinue to give damages down to the time of trial; at all events, there is no established practice the other way, and it would be much more convenient that the whole damages should be recovered in one action, so as to avoid the necessity of bringing another. No instance of any such second action, however, has been found, which is strong evidence that the practice has been to recover all in one action, and that the plaintiffs have no further remedy.

Collier replied, and did not call any witness.

BYLES, J.—Evidence of usage is not admissible; but I am of opinion that, upon the terms of this undertaking, the plaintiffs had the power of claiming back the pianos at any time, whether in the middle of a month or not. As to the damages, the plaintiffs cannot recover for the detention subsequent to the date of the writ. Therefore the jury

(*a*) See *Robinson* v. *Bland*, 2 Burr. 1086.

(*b*) 5 C. B. 318; *S. C.* 17 L. J. (N. S.) C. P. 82.

(*c*) See also *Crossfield* v. *Such*, 8 Exch. 159; *S. C.* 22 L. J. (N. S.) Exch. 65.

must only give nominal damages. The plaintiffs will hereafter have an opportunity of objecting to this ruling; but, as the subsequent damages are so small, the case ought not to be carried any further.

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Parry, Serjt.—The plaintiffs will not do so.

Verdict for the plaintiffs, damages, 1*s*.

Coram Pollock, C. B.

BERRI *v.* HOWARD.

Michaelmas Term.

In an action on an apprenticeship deed, against the father, the breach being that the son absented himself, the plaintiff can only recover damage for the loss of service up to the time of action. And the action is not for an alleged wrong within the C. L. P. Act of 1860, s. 34, as to costs.

ACTION by the master against the father on a deed of apprenticeship, whereby the son was bound apprentice to the plaintiff for seven years from the 1st of January, 1855.

Breach: that the son did not faithfully serve, but during the term unlawfully absented himself, and has *from thence hitherto* remained absent from the service of the plaintiff.

Pleas: 1. That there was no such breach as alleged.

2. That the plaintiff, until the alleged absenting, treated the apprentice with great cruelty, injustice and oppression, and falsely and maliciously accused him of divers felonies, and abused, assaulted and beat him, and spoiled his work, and thereby designedly excited in his mind a feeling of hatred and dislike, with the purpose of causing him to absent himself from the service, whereby and solely by means whereof, and without the default and against the will of the defendant, the son absented himself, which is the alleged breach. Issue.

Hawkins and *Quain* for the plaintiff.

Price for the defendant.

The plaintiff, the master, being called, stated that the apprentice had spoiled a great deal of work, and had been in the *habit* of absenting himself during hours of work; that eighteen months before his last absenting himself, he would have been brought up before a magistrate, but that

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his mother begged him off; that when he went away he was earning 12*s.* or 15*s.* a week, and that his labour was worth more than 25*s.* a week, including that which was allowed him as his own earnings. That he went away on the 30th June, 1858, and had not returned; and that the plaintiff had inquired for him at his parent's without success.

The action was brought in *August*, 1858 (*a*).

Price, for the defendant, called no witnesses.

POLLOCK, C. B. (to the jury).—This is an action very rarely *brought*, though no doubt it strictly *lies*. The plaintiff cannot recover except for the absence from 1st June to August, and for that short period the jury may consider what was the real value of the boy, and may give nominal damages. No doubt there is no defence; but the damages are for you.

Verdict for the plaintiff, damages one farthing.

Price applied to his LORDSHIP to certify, under the Common Law Procedure Act of 1860 (*b*), to deprive the plaintiff of costs, as the action was in substance one of tort; but

POLLOCK, C. B., refused, saying it is strictly in contract.

(*a*) It stood for trial at Michaelmas Term, 1858, but had been delayed by a commission on the part of the defendant to examine one son in India, whither he had gone with a regiment in which he had enlisted, and the commission had been enlarged until the son had returned to England.

(*b*) When the plaintiff in any action for *an alleged wrong* recovers by the verdict of a jury *less* than five pounds, he shall not be entitled to recover from the defendant any costs whatever in respect of such verdict . . . "can the Judge . . . shall *immediately* afterwards certify . . . that the action was not really brought to try a right beside the mere right to recover damages; *and* that the trespass or grievance in respect of which the action was brought was not wilful or malicious; *and* that the action was not fit to be brought." It has been thought that these words are not capable of a judicial construction, but the above case affords an apt illustration of their meaning, viz., that the action is for an alleged wrong, which turns out to be mere legal and technical wrong without any substantial damage, nor any intentional injury, nor any necessity to try a right. As to the words "*alleged wrongs*," some light is

thrown on their construction by s. 74 of the C. L. P. Act, 1852, "whereas certain causes of action may be considered to partake of the character both of breaches of contract and of wrongs," &c. That clause refers no doubt to actions for breach of general duty as against carriers or bailees (see cases cited in *Courtnay* v. *Erle*, 10 C. B. 73). And hence it seems to follow, that the "alleged wrong," in the clause of the Act of 1860, may mean a breach of duty, and not *merely* as in the 3 & 4 Will. 4, c. 42, s. 2, as to executors a "wrong *committed*," which means a tortious *act*, for which reason probably the above clause does not say "action for any tortious *act*." And there may be acts, as commissive waste, by a tenant, for which the defendant would be liable in case, notwithstanding a contract, even by deed (*Burnett* v. *Lynch*, 5 B. & C. 589); so of an action for seducing away an apprentice or other servant (see *Lumley* v. *Gye*, 22 L. J., Q. B. 463). But in an action like the present, merely for the act of *another* person for whom the defendant has become *responsible*, which can only be by *contract*, of course the action is in no sense for wrong, i. e. for a wrong of the *defendant*. *Vide ante*, p. 284, n. (c).

Coram Martin, B.

COBBETT *v.* WOOD AND OTHERS.

Hilary Term.

An order to amend the entry on the *nisi prius* record, &c., *held*, to authorize an amendment of the judgment roll, the judgment being for the defendants (upon a nonsuit), and they not having the *nisi prius* record.

TRESPASS and false imprisonment.

Plea: justifying under a writ of *ca. sa.*, sued out upon a judgment at the suit of *five* persons named. Issue.

The plaintiff having proved the arrest,

The defendants produced a copy of a judgment, certified by the Master, purporting to have been obtained at the suit of the *five*, and to be for costs of a nonsuit in an action by the present plaintiff; and then put in an order by HILL, J., to amend the *nisi prius* record; instead of which, the now defendants, not having the *nisi prius* record, had amended the judgment roll.

MARTIN, B., held this sufficient, and directed a

Verdict for the defendants.

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RUTLEDGE *v.* THE LOCAL BOARD OF HEALTH FOR FARNHAM.

Hilary Term.

On a contract by a board of health to employ the plaintiff, an engineer, about certain works, and pay him 500*l.* during two years, he undertaking to do his best to complete the works within that period:—*Held*, that they were not liable for refusing to allow him to carry on the works beyond that time, even though the delay was caused by their fault or default, they paying him the whole 500*l.*; nor are they liable for any extra work not contracted for by deed.

THE declaration (dated 20th October, 1860) stated that by an agreement sealed with the defendants' seal, and duly made and entered into the 30th September, 1858, between the plaintiff and the defendants, the plaintiff covenanted to complete plans for a system of drainage for the Farnham district, and act as surveyor, &c. in and about the necessary works; and would, so far as in him lay, carry out and complete the whole of the said works within two years from the 1st October next. And it was covenanted on the part of the defendants that, provided the plaintiff should perform all the covenants on his part, they would pay to him 50*l.* on the 1st of the months of January, April, July and October in each of the said two years; and also, but only in the event of the whole of the scheme being completed on or before the 1st October, 1860(*a*), and not otherwise, then, *on* such completion, that they would pay him such further sums as should make up 500*l.*

General averment of readiness, &c., and that all things have happened to entitle the plaintiff to maintain the action. And although the plaintiff commenced, &c., and was ready and willing to conduct the completion of the same, yet the defendants did not, nor would, allow the plaintiff to carry out the said works, but prevented him from so doing, and ***wrongfully dismissed him from his said employment while he was employed in so doing*** (*b*). And the defendants did not, nor would, pay to the plaintiff the said sums of money in and by the said agreement provided; and although by their wrongful acts and conduct and default, without any fault or default of the plaintiff, the defendants prevented the whole of the said works from being

(*a*) This action was commenced before then as would appear from the record and the writ.

(*b*) No averment that the two years from 1st October, 1858, had *not* elapsed, *sed vide supra*.

completed on or before the 1st October, 1860, yet the defendants did not, nor would, on or since the said 1st October, 1860, pay to the plaintiff the said further sum by the said agreement provided.

Second count, for work done, &c.

Pleas: (To the first count.) 1. That the defendants did not covenant as alleged.

2. Denying the breaches, as alleged.

3. As to the residue of the declaration, never indebted, except as to 55*l.* 8*s.* 3*d.* paid into Court.

Hawkins and *Needham* for the plaintiff.

Knowles and *Coleridge* for the defendants.

The plaintiff had been paid such sums of money as, with the sum paid into Court, made up the 500*l.* He, however, claimed for a certain amount of work *ultra* the original contract, as well as damages for not having been permitted to, or for having been prevented from, completing the work; but

MARTIN, B.—On any construction of the contract it is clear that the plaintiff was not entitled to be retained beyond the two years (*a*), nor to claim beyond the 500*l.* And as to the extras, the board could not bind themselves without deed (*b*); and the very mischief to be guarded against is such charges for extras. There must be a

Nonsuit (*c*).

(*a*) See *Dunn* v. *Sayle*, 5 Q. B. 685, and *Aspdin* v. *Austen*, 5 Q. B. 671.

(*b*) See *Freud* v. *Dennett* (*Worthing Board of Health*), 4 C. B., N. S. 576.

(*c*) Thereupon the parties agreed to terms.

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Coram Bramwell, B.

TOPPING *v.* BULL.

Hilary Term.

An agreement with an auctioneer, in a letter to him, employing him to sell goods in consideration of an advance obtained by him:—*Held*, not capable of being qualified by any condition, as to *time*, to be implied from *previous* letters.

Held, also, within the exemption in the Stamp Act, as "relating to the sale of goods."

THE declaration stated that, on the 21st October, 1858, in consideration that the plaintiff, at the request of the defendant, would obtain for the defendant an advance of 150*l.* on a bill of exchange, accepted by the defendant and drawn by the plaintiff, the defendant promised to and agreed with the plaintiff to employ him to sell certain fixtures, furniture and effects, and to pay him a commission, &c., and that the plaintiff might retain out of the proceeds 150*l.* to pay to one Dixon, who had made the advance.

Averment: that the plaintiff obtained the advance and was always ready and willing to sell the fixtures, &c., and performed all things, and all things happened to entitle him to be employed to sell, &c.

Breach: that the defendant did not, nor would, employ the plaintiff to sell, &c., but employed other persons, whereby the plaintiff lost his commission.

Pleas: 1. That the defendant did not promise as alleged.

2. That the plaintiff did not obtain for the defendant the said advance, &c.

Mellor and *Raymond* for the plaintiff.

Lush and *Brown* for the defendant.

The action was brought on the letter addressed by the defendant to the plaintiff (an auctioneer) on the 21st October, 1858, to the effect stated in the declaration. This was delivered and retained by the plaintiff. It was unstamped. At the first trial, before POLLOCK, C. B., this was objected; but it was held that the agreement was within the exemption "relating to the sale of goods" (*a*).

The letter, dated 21st October, was put in, and the employment of other persons to sell. On cross-examination

(*a*) *Southgate* v. *Bohn*, 16 M. & W. 34.

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it appeared, that on the 6th October, the plaintiff, an auctioneer, wrote to the defendant—

"If you should think fit to entrust me with the management of the sale, &c., &c., and if, pending the preparation for it, 300*l.* will be of any use, you can have it."

On the 14th October the plaintiff wrote to the defendant's agent:—"Mr. Bull wanted an advance of 150*l.* I shall have plenty of funds in a week; meantime I can get him an advance from a friend by my drawing on him."

Afterwards the plaintiff wrote:—"I have seen my friend, and can have an advance of 150*l.* till the house is sold, in one, two or three months," &c.

On the 18th October the defendant had written to the plaintiff thus:—"I have just seen another party, and can have an immediate advance of 150*l.*, or even more, *until such time as the sale comes off, that is, one, two or three months.*"

And one Dixon made the advance accordingly.

And on these letters the Chief Baron had directed a nonsuit, which was set aside.

A letter from Dixon, of the 24th December, ran thus:—"When you called upon me with Mr. Topping, and I made the advance, it was upon the clear understanding that the sale should not be postponed for more than a month or six weeks."

Dixon was called for the plaintiff, and stated that this was the utmost delay that was to have been allowed.

The plaintiff obtained an advance of 150*l.* for the defendant from one Dixon, the defendant giving a bill for the amount, payable *on demand.*

In consequence of a delay in the sale for two months, Dixon wrote to the plaintiff; and, not having received payment, caused the bill to be presented in January, when it was paid by the defendant.

In the ensuing spring the plaintiff discovered that the conduct of the sale had been entrusted to other auctioneers,

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and claimed his commission of five per cent. on the sum of 3,280*l.*, the amount realized, viz. 164*l.* But it appeared that half the property sold was not included in the agreement and now sued upon, and that the preparations for sale would have occupied the plaintiff a month; the value of his time being estimated by him at 3*l.* 3*s.* a day, which would come to 72*l.*

The case for the defendant was, that he required the loan until the sale, when it could be paid out of the proceeds, but that Dixon would not wait; and that the defendant had to obtain the money from the auctioneers who were employed, and who had stipulated that they should have the sale.

At a former trial before POLLOCK, C. B., it was contended that, by the construction of the letters, the contract was as contended by the defendant; and his LORDSHIP being of that opinion, directed a nonsuit, which had been set aside; and now

BRAMWELL, B., directed the jury that there was a complete contract in the letter of the 21st October, on which there appeared to have been a cause of action by the non-employment of the plaintiff; directing them, as to damage, that the value of time he would have been engaged should be deducted.

Verdict for the plaintiff, 40*l.*

Coram Wilde, B.

BIKKER *v.* BEESTON AND OTHERS.

Hilary Term.

A defendant, in trespass, failing to justify under a writ of *habere*, the judgment in ejectment having been set aside as irregular, *held* entitled, either under a plea that the plaintiff was not possessed, or that a third party else was, to go into proof of the title upon which he recovered in the action of ejectment.

TRESPASS, against Beeston, Green, Bartley, Harris and Glass, for entering a house (*a*), No. 1, Winterton Place, Park Walk, Chelsea, and removing the plaintiff's goods.

(*a*) See same case, Vol. I., p. 685.

Pleas (by the defendant Bartley, an attorney, in person, and by the other defendants, by him as their attorney): 1. Not guilty.

2. Not possessed.

3. That Beeston was lawfully possessed of, the plaintiff unlawfully on, the premises, and that he, and the others in his aid, removed him.

4. (Similar plea.) Laying the possession in one Calvert.

5. (By Green.) Justifying under a writ of *habere facias possessionem*, delivered by the sheriff to certain bailiffs, who desired defendant Green to assist in the execution of the writ.

Pearce and *Laxton* for the plaintiff.

Parry, Serjt., and *Gibbons*, for the defendants.

It appeared that in an action of ejectment by the now defendant Beeston against Bikker to recover possession of the premises, judgment was recovered by Beeston, under which the writ of *habere*, mentioned in the fifth plea, had been issued; the execution of which, the judgment and execution having been set aside as irregular (*a*), was the trespass complained of.

WILDE, B.—The writ would be a defence as to those who executed it, but Green alone pleads it; and it does not appear that any of the defendants acted in aid of the bailiffs, or that any one of the defendants was a bailiff employed to execute the writ, or that the writ was delivered by the sheriffs to bailiffs at all; but rather that the attorney took upon himself to execute it, and the defendants helped him; and as the writ has been set aside as irregular, it only justifies the sheriffs' officers (*b*).

Parry, Serjt., proposed to rely on the third and fourth pleas; but

WILDE, B.—It appears that neither Beeston nor Calvert were ever in possession.

(*a*) See *Bikker* v. *Beeston*, 29 L. J., Exch. 121.

(*b*) *Carrington* v. *Lloyd*, 8 A. & E. 449; *Prentice* v. *Harrison*, 4 Q. B. 852.

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Parry, Serjt., then proposed to adduce evidence under the *second* plea to prove that the defendant, and not the plaintiff, was lawfully entitled to the possession of the premises, which were leasehold, for the remainder of a term of years.

Pearce objected that this case would not be admissible under that plea; but

WILDE, B., after consulting MARTIN, B., held that it was admissible under the plea of not possessed (*a*), if not either of the other pleas.

Parry, Serjt., then proceeded to proof of the title on which the now defendant had recovered a verdict in the action of ejectment, and a difficulty arising as to the production of certain leases,

WILDE, B., adjourned the trial for the purpose of procuring them (*b*), on the terms of the defendants paying all the costs *occasioned* by the adjournment.

At the adjournment day, the proof of the possessory title in defendant being completed, it appearing that he was executor of the termor, who had devised it to Calvert. That he had let the house in 1840, but from that time till 1858 had not looked after it, having been away. That in 1858 he had distrained on Bikker, then in possession, but had been sued in trespass for so doing, and failed. But in the action of ejectment he could not deny that there had been an arrangement to give up possession to Calvert as the party really entitled; and he swore that he had acted *under* the authority of Calvert.

Pearce objected that there was evidence of an assent to the bequest to Calvert.

WILDE, B.—He swears he entered under Calvert's authority.

(*a*) *Jones* v. *Chapman*, 19 L. J., Exch. 456.

(*b*) C. L. P. Act, 1854, s. 19.

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Pearce.—There is no evidence that he or Calvert were possessed; on the contrary, it appears that they were *not*.

WILDE, B.—There is the second plea, which raises the question whether the plaintiff was lawfully possessed. (To the jury.)—The title is proved to be in defendant or in Calvert, and that as against them the plaintiff had no right to the possession. The defendant, therefore, could recover in ejectment, and would be justified in entering, without any unlawful violence (*a*). As between these parties—defendant swearing that he acted under Calvert—the question is, whether the plaintiff was lawfully possessed as against them or either of them? That is, whether plaintiff is the real owner, or entitled to possession?

Verdict for the defendants on the *second* plea (*b*).

(*a*) See *Newton* v. *Harland*, 1 M. & G. 644; *Collins* v. *Thomas*, Vol. I., p. 416.

(*b*) *Pearce* moved and got a rule as to the effect of the memorials put in as proof of title, but the rule was discharged.

Court of Queen's Bench, Guildhall, coram Wightman, J.

LLOYD *v.* SHAW.

1860.

Easter Term.

In an action against a shipowner for not assigning to the plaintiff a first-class cabin according to contract; Pleas, that defendant was ready and willing, and that plaintiff was *not*, to perform the contract; evidence that after twice depriving plaintiff of cabins he had approved of, and then offering him one which he declined, there being no evidence that after *that* there was any offer of another:—*Held*, that the question for the jury was, whether the one last offered was a first-class cabin.

ACTION against a shipowner for not giving the plaintiff a first-class cabin on a certain voyage.

The first count stated that, in consideration of 45*l.*, whereof 20*l.* was then paid by the plaintiff to the defendant, the remainder to be paid prior to embarcation, the defendant promised the plaintiff that he should be provided with a first-class passage in a ship to sail on the 20th November, 1859, from London for Auckland, &c.

Averment, that plaintiff was ready and willing to perform, &c.

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Breach, that the plaintiff was not provided with such first-class passage in the said ship, and the ship sailed without being so provided, whereby he was prevented from embarking in the ship, and was put to great expense in procuring furniture and fittings, and in procuring a passage in another ship, &c., and lost the said 20*l.*, &c., and sustained great inconvenience by being detained in this country.

Second count, that after the agreement mentioned in the first, the plaintiff, with the consent of the defendant, had selected a cabin, and the defendant let it to another person, and in consideration that the plaintiff would consent to take a certain other cabin to be erected, the defendant promised the plaintiff that it should be erected for him; yet the cabin was not erected nor was the plaintiff allowed to use the same, whereby he was prevented from embarking in the said ship (*a*).

Count for money had and received.

Pleas: 1. That the defendant did not promise as alleged.

2. That the plaintiff was not ready and willing to perform his part of the agreement.

3. That the defendant was always ready and offered to provide the plaintiff a first-class cabin according to the agreement, but the plaintiff wholly refused to accept it.

There were similar pleas to the second count.

Hawkins and *Karslake* for the plaintiff.

M. Chambers and *V. Williams* for the defendant.

The plaintiff went to the ship, agreed for a first-class passage to Auckland, saw a cabin which he liked, put a card upon it, paid a deposit and got a passenger's ticket in accordance with the provisions of the Passengers' Act (*b*).

(*a*) Upon this count there was a rule *nisi* to arrest the judgment, on the ground that there was no consideration for and promise to provide a particular cabin, and that it would have been enough to provide a cabin a reasonable time before the ship sailed.

(*b*) "I hereby agree that the person shall be provided with a first-class cabin passage," &c.

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When the plaintiff went again to the vessel, a few days afterwards, he found other persons in the cabin; he saw the defendant, who said he was sorry that he did not know the plaintiff had paid his deposit; that the other persons had engaged the cabin before him, but that he should have another better, as they were going to put up a first-class cabin between decks, of which he should have the whole, and which would be more roomy and airy. The space for this cabin was shown to him and approved of, and he assented to the arrangement. When the cabin was built, however, he was told that it was not for him, but plaintiff insisted that it was, put a card upon it, and sent furniture for it, which he had bought, but which was removed out of it. Subsequently he was offered a cabin elsewhere, which he was promised should have port-hole and "dead-light," but which he said was close and dark, and on the 29th November his attorney wrote to the defendant thus: —"Understanding you refuse to allow Mr. Lloyd to occupy the cabin you agreed he should occupy, in lieu of the berth originally engaged by him, we give you notice that, unless we hear that he has been permitted to occupy that berth or the one substituted for it, he will not proceed in the ship, and will hold you liable."

The ship remained some ten days longer at the docks, and it did not appear that the defendant had offered to the plaintiff any other cabin than that which he had rejected.

He declined to proceed in the ship and had to wait for another for ten months, losing his deposit (20*l.*), and various expenses incurred, and sustaining great inconvenience.

WIGHTMAN, J. (to the jury.)—1. Was it agreed that the plaintiff should have a larger cabin for himself than the one which he was to have had at first?—Yes.

2. Was it agreed that the cabin which the plaintiff was to have should have a port-hole and dead-light?—Yes.

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3. Was the cabin in which the plaintiff put his furniture that which it was agreed he should have?—Yes.

4. Was the cabin offered him as large a cabin as it was agreed he should have?—No.

5. Was the cabin offered him suitable for a first-class passenger?—No.

6. Then what damage did the plaintiff sustain?

Verdict for the plaintiff, 100*l.* (*a*).

(*a*) *Chambers* had a rule *nisi* to set aside the verdict, on the grounds—1. That the letter of the 29th November showed that the plaintiff had not been ready and willing to accept *any* first-class cabin the defendant might assign to him: 2. That the verdict was against evidence, and also to arrest the judgment on the second count. But *Wightman*, J., reporting that he was quite satisfied with the verdict; and the Court being of opinion that the first count, at all events, was supported, and that there was no evidence that *within a reasonable time* the defendant had offered a proper cabin to the plaintiff; the rule in T. T. was, on argument, discharged.

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Easter Term.

In an action on a policy disclosing that it was on a river-going vessel for a voyage to a foreign port, issue being taken on a plea denying seaworthiness, the question for the jury is, whether the vessel was seaworthy for the voyage.

CLAPHAM *v.* LANGTON AND OTHERS.

ACTION on a policy of insurance on a steam-boat.

The policy set forth the dimensions of the vessel, which were such as to show that she could only be designed for river navigation (200 feet long and 400 tons burden, with a draught of only two feet), and the insurance was for a voyage from the Tyne to Odessa.

The claim was for general and particular average.

Plea: that the ship was not seaworthy. Issue.

Bovill and *Lushington* for the plaintiff.

Shee, Serjt., and *Raymond*, for the defendants.

The steam-boat had been ordered to be built for river navigation in Russia. At the time of the insurance the insurers had a knowledge of its destination. It was proved that the vessel was well built, according to the specification, the dimensions from which were, with the assent of

the underwriter, inserted in the policy. It was admitted that a vessel with such dimensions would not be fitted for ocean navigation, and that therefore it was intended to take it to Odessa in fair weather.

Upon the part of the plaintiff, however, ship-builders and others were called to prove that it would have been easy to make the vessel seaworthy for *the voyage*, by certain temporary strengthenings, which in some degree, but not in a sufficient degree, had been applied before it left the Tyne; that some parts of the vessel, as the bulk-heads, were thin, and required such strengthening to make such a voyage safe.

The evidence as to the voyage was, that after leaving the Tyne in July, the weather being rather rougher than usual, the vessel suffered considerably between that port and Dartmouth, where it was obliged to put in; that at Plymouth, where she was again compelled to put in, the crew deserted, in consequence of their belief that she was unseaworthy; that she was again obliged to put in at Falmouth, where it was found that her plates and bulk-heads had been torn away, and that she had "buckled," and there some further strengthenings were applied. But still she suffered greatly, and reached Odessa in a very damaged state.

On the part of the defendants evidence was given to show that the requisite strengthenings had been applied at the Tyne, and that the damage had been caused by unusually rough weather.

WIGHTMAN, J. (to the jury.)—The question for you is, whether the vessel was seaworthy *for the voyage?* If not, find for the plaintiff.

Verdict for the plaintiff (*a*).

(*a*) *Shee*, Serjt., obtained a rule *nisi* to set aside the verdict, but only as against evidence. *Cockburn*, C. J., referred to *Blyth* v. *Samuda*, *post*, p. 430.

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ROMULO *v.* ALLEN.

On a plea of discharge from a bill under the Insolvent Court, it is enough that the bill is *substantially* described, and that the schedule mentions the last *known* holder.

ACTION on a bill of exchange, dated 30th October, 1858, drawn by the defendant on, and accepted by, one Standish O'Grady, and by defendant indorsed to one Worman, and by him to the plaintiff.

Plea: discharge under the Insolvent Act. Issue.

Hawkins and *H. T. Cole* for the plaintiff.

Dowdeswell for the defendant.

The question was, whether the *bill* had been duly described in the defendant's schedule.

The debt was duly entered, for which it had been originally given, and then the bill was thus described—the schedule having been filed in the month of April, but amended on the 11th May:—

"Bill for £45; dated *about November*, 1858; *drawn by* Standish O'Grady, of, &c., accepted *by me* and indorsed to Worman."

The defendant was called, and said that Worman had discounted the bill for him, and that he had *not* received notice of dishonour and knew nothing of the plaintiff being holder; but that, on the 4th May, he received from Worman a letter to this effect:—"I have received notice from a large firm in the city of the dishonour of your bill, &c.," the terms of the letter being such as to make it a good notice of dishonour, supposing it given by or on behalf of the holder.

For the plaintiff, a clerk of his was called, who proved presentation of the bill to the acceptor on the 3rd May, and transmission of notice of dishonour to the defendant on the next day—the very day, it will be observed, on which Worman's letter was dated.

Worman was called, and gave evidence which would have been amply sufficient to fix defendant with knowledge that the plaintiff was the holder; but, being cross-examined

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as to his letter, said it was a "mere form," and did not pretend that by the "large firm" mentioned therein the plaintiff was meant, nor did it appear that the plaintiff *was* in any "firm."

WIGHTMAN, J., put the credibility of Worman's evidence to the jury, who said they did not believe it. The learned Judge then held the description sufficient, reserving the point; and there was a

Verdict for the defendant (*a*).

(*a*) *H. T. Cole* got a rule *nisi* to enter the verdict for the plaintiff, on the grounds, (1), that the *bill* was not duly described, and, (2), that it should have been mentioned that the bill was in the hands of the plaintiff or some person unknown. But in T. T., the Court on argument discharged the rule, adhering to the rule that "If an insolvent state a bill in his schedule as drawn by himself on M., whereas it was drawn by M. on him, it will be for the jury to say, whether they are satisfied that the same bill was meant; and whether, if it was, they think the misdescription was by mistake or with intent to mislead or deceive any one; for if they think the same bill was meant, and that the misdescription was by mistake, it is a good discharge." *Nias* v. *Nicholson*, 2 C. & P. 120; R. & M. 322—ABBOTT; and holding that, as Worman's evidence had been disbelieved, there was no evidence that the defendant knew who the holder was, or any reason to believe that Worman was *not*. *Vide Levy* v. *Dolbell*, M. & M. 202; *Lewis* v. *Mason*, 4 C. & P. 322; *Burcham* v. *Walker*, Vol. I., p. 477, n. (*d*).

STEVENS *v.* TAYLOR.

1860.

Easter Term.

On a clause in a building agreement under which rent had not been paid (and not amounting to a demise), that in case of default in not completing buildings at successive periods, the owner shall be at liberty to re-enter and seize materials, &c., there having been continued and successive defaults, and several periods of indulgence, but no waiver of the *last* default, and no alteration of the builder's position to his prejudice, and no default on the part of the *owner*;—*Held*, that the owner was entitled to re-enter and seize the materials.

TRESPASS, for entering the plaintiff's land and taking his building materials.

Pleas: 1. Not guilty.

2. Not possessed of the land.

3. Not possessed of the goods.

4. Leave and licence. Issue.

G. Francis for the plaintiff.

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C. Pollock for the defendant.

On the 2nd September, 1858, the plaintiff and defendant entered into an agreement, by which the defendant agreed that, after the plaintiff should have built twenty-two houses as specified, he would lease to him the land, and for a term of years from September 29, 1857, at a rent of 4*l.* for each house, and the plaintiff agreed that he would build the houses on the land to the satisfaction of the surveyor, and that he would cover in four of the houses on the 25th December next (1858), and finish the same, fit for occupation, on or before the 30th April next (1859), and cover in nine others on or before the 24th of June, 1859, and finish the same, fit for occupation, on or before the 25th December, 1859, and cover in the remaining houses on or before the 25th March, 1860; the whole of the houses, with fences, roads and drains necessary thereto, to be finished fit for occupation on the 29th September, 1860. The plaintiff to pay to the defendant such fair and proportionate sum as should be determined upon by the surveyor for constructing such principal or other drain along the whole frontage as should be directed by the defendant, and make a proper drain from each house communicating therewith. The plaintiff to have separate leases of the messuages so soon as, but not before, *all* of them should have been covered in, and the road and paving completed, and certified by the surveyor at a ground-rent of 4*l.* per annum. And it was further agreed that, in default by the plaintiff before any lease was granted, or on nonpayment of the said rent or any part thereof for twenty-one days after becoming payable, or non-performance or non-observance of any of the stipulations aforesaid, then, as to any part of the ground which may not have been so demised in the meantime, it shall be lawful for the lessor to enter and take possession thereof; and this agreement, as to such part of the ground, shall thenceforth be voidable by the lessor, and all improvements, materials, chattels and effects

on the ground shall be absolutely forfeited to him or them. And it was provided that time should be of the essence of the contract; that the agreement should not be construed to operate as a demise; and that, should the plaintiff not proceed regularly with the building to the satisfaction of the lessor, then it should become void, and the defendant be at liberty to re-let the land. There was a memorandum at the foot:—"This agreement is subject to another agreement dated the 3rd September, 1858, and it is understood that this shall be a notice that this agreement is charged to the said T. J. Taylor." The agreement of the 3rd September thus referred to was one by which any monies which might be advanced by the defendant to the plaintiff for building the houses should be a charge upon the premises, and it was added at the end, "this agreement is made to secure such money as may hereafter be due to the said T. J. Taylor, but in no other way to affect the agreement of the 2nd September, 1858."

The trespass was on the 15th August, 1859, and was an entry and seizure by the defendant under the agreement first mentioned.

The plaintiff was called, and from his evidence, and that of one Green, it appeared that he had been delayed for some time waiting for plans, &c., and that the defendant had not made the principal drain along the whole frontage; in consequence of which, as the house-drains could not be opened into it, he had to keep two men at work to free the sites of the houses from the water.

But it did not appear that he had applied for the plans or tendered the money for the principal drain.

On the 25th December, 1858, the four first houses were not, as they ought to have been according to the agreement, covered in. But in the first week of March they were so.

On the 21st March, 1859, the defendant wrote to the plaintiff that he was not satisfied with the way in which

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the houses were being carried on. About this time the defendant said to the plaintiff, "Don't go on with the other nine, finish these four first," those four having, it will be observed, to be completed by the 30th April. There was a sum due for rent.

On the 25th April, 1859, the defendant wrote to the plaintiff: "I give you notice that I insist on payment of the rent due, and that, unless there is a great alteration in the course of a week, and matters are put in a more satisfactory condition, I shall put the matter in my attorney's hands." On the 20th May the defendant wrote in similar terms. And, on the 31st June, the defendant's attorney wrote to him to the effect that the first four houses were to have been finished by the 30th April, and nine more to be covered in by the 24th of June, which had not yet been commenced; that, therefore, the plaintiff had forfeited all right to any lease; and that, unless security was given for the proceeding with the work, the defendant would avail himself of the forfeiture committed and take possession of the land.

No such security was given, and no rent having been paid under the agreement, on the 15th August the defendant took possession of the land and some building materials thereon, which was the trespass complained of.

C. Pollock contended that there was no case, as the plaintiff had no right of possession at the time of the defendant's entry.

G. Francis contended that there had been no right of forfeiture, as the default of the plaintiff had been caused by the defendant, or had been waived.

WIGHTMAN, J., was of a contrary opinion, and directed a

Nonsuit (*a*).

(*a*) A rule *nisi* was obtained for setting this nonsuit aside, but on argument, in T. T., the Court were clearly of opinion that the nonsuit

was right, but, at their suggestion, the parties agreed to a *stet processus*. The Court pointed out that there had been no demise nor any payment of rent under the agreement, and that as to the goods—the case was not one of forfeiture but of seizure in case of default, and there was no evidence that the defendant had either *caused* or *waived* the default, and on that the defaults were *continuing*, and a waiver to amount to anything, must be as to the *last* defaults; and it did not appear that the plaintiff had altered his position to his *prejudice*, in consequence of indulgences, which were obviously for his *benefit*.

Coram Cockburn, C. J.

WALTER *v.* WILLIAMS.

1861.
Hilary Term.

TRESPASS, for breaking and entering a shed of the plaintiff and pulling down a wall, and assaulting the plaintiff.

Pleas: 1. Not guilty.

2. Not possessed.

3. That the place was the freehold of certain persons, by whose command the defendant committed the trespasses.

4. That the defendant was possessed of a messuage, the occupiers of which for twenty years enjoyed, as of right, a way on foot, with horses and carriages, from a public highway, over the said close of the plaintiff to the said messuage, &c., justifying the removal of the shed and wall as obstructing the way.

5. Similar plea, of *forty* years.

6. A right of way, by prescription, in the owners of adjoining premises, for their tenants; the defendant justifying as tenant of those premises.

Replication, to the third plea, that the persons therein mentioned demised to one Shove the shed and close for thirty-one years, from June, 1843; that in March, 1853, Shove demised to Couldery for twenty-one years; and that in July, 1854, Couldery *demised to the plaintiff* for nineteen years, by virtue of which he was possessed until the time of the trespasses. Issue.

Where the plaintiff derived title to the *locus in quo* under a lease from the owners, within the last twenty years (without any reservation of a right of way), and the defendant had within that time occupied part of the *locus*, and taken adjoining premises by a subsequent lease from the original lessors:—*Held*, that he could not set up a right of way over the land by user, or of necessity.

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WALTER v. WILLIAMS.

Phinn and *J. Brown* for the plaintiff.

Parry, Serjt., and *Beasley*, for the defendant.

In the lease to Couldery, the piece of land in question, about 4 feet 8 inches wide, was described as covered by a shed; and there was a kind of lean-to, open at both ends, and leading both into a yard used in common by the occupiers of the houses, and on to the premises of the defendant.

The lease to the plaintiff demised all that was demised by the lease to Couldery.

And the original lease to Shove demised all that was coloured "red" on the plan annexed, which included the piece in question.

When the plaintiff took possession, the defendant had occupied his (the plaintiff's) present premises some years.

In 1856 the freeholders mentioned above leased to the *defendant* two messuages, with the yards or gardens thereunto belonging, situate, &c., with all ways and easements thereto belonging.

The piece of land in question was at the rear of one of these houses; the other being between it and the *plaintiff's*.

The whole of the land at the rear of the premises was originally waste, up to and before the lease to Shove, who built the house of the plaintiff, and let part for a lecture hall; behind which were the defendant's stables.

Until then there had been unity of possession of the whole property.

The plaintiff's case having been rested on the actual conveyance of the *locus in quo* to the plaintiff, without any reservation of a right of way previously to the lease to defendant,

Parry, Serjt., and *Beasley*, contended that the land had not passed to the plaintiff, although included in the "part coloured red" in the map annexed to the lease, because it was described as covered with a *shed*, and there was no "shed," but only a lean-to; but

COCKBURN, C. J.—The land passed by the words of reference to the plan, and the description of the kind of erection upon it was, even if erroneous, only *falsa demonstratio.*

Parry, Serjt., proposed to set up a way of necessity; but

COCKBURN, C. J.—The lease to the plaintiff was prior to the conveyance to defendant, and the lessors could not derogate from their own grant.

Parry, Serjt., then proposed to prove a user of a right of way over the place without any objection until the lease to the plaintiff in 1853, nor any actual *obstruction,* until the present year.

COCKBURN, C. J.—There was unity of possession during a part of the time, and not twenty years' *adverse* user.

Parry, Serjt., offered to prove that when the plaintiff took the lease there was, across the piece of land where the plaintiff had erected the wall, a right of way through and over the piece of land in question.

The defendant was called, and proved that he had *occupied* his house since 1840, and he and many witnesses, whose memory went back forty years, spoke to a right of way over the piece of land in question, which was now the only access to his stables; and some of them spoke to a *gate* existing long before and when the plaintiff took his lease.

COCKBURN, C. J., left the case to the jury on the question of fact, whether there had been the right of way, as the defendant's witnesses described it, when plaintiff took his lease? which they found in the affirmative; upon which his LORDSHIP, reserving leave to the defendant to move, directed a

Verdict for the *plaintiff* (*a*).

(*a*) See, as to the doctrine of apparent easement, *Glave* v. *Harding,* 27 L. J., Exch. 286. *Parry,* Serjt., obtained a rule to enter the verdict for the defendant, which was discharged, there being no plea to raise the question of an apparent easement, and no application to amend, which COCKBURN, C. J., said he would have acceded to.

1861.

SIMPSON *v.* YOUNG AND OTHERS.

Hilary Term.

Ship-brokers, not being owners of the particular ship, though they were of others, having issued advertisements and tickets, announcing the times of sailing, and describing the ships as *their* "line;" evidence being given that if they were owners the announcements would be in the same form, but that it was a form always used by brokers:—*Held*, that it was for the jury, on the whole evidence, whether they had held themselves out as owners, or had acted only as agents.

DECLARATION, that on the 20th August, 1856, the plaintiff, at the request of the defendants, shipped on board a vessel then advertised by them to sail for Auckland, in New Zealand, certain goods, upon the terms then agreed upon between the plaintiff and the defendants, *i. e.*, that the goods should be conveyed for the plaintiff in the said vessel to Auckland for certain freight to be paid by the plaintiff, and that the said vessel should sail for Auckland within a reasonable time after the goods had been shipped.

Averment, of all things, &c.

Breach: that the vessel did not sail within such time, nor at any time, to Auckland, by reason of which the plaintiff has lost his profits, and has been put to losses, &c. (*a*).

Pleas: 1. That the defendants did not promise as alleged.

2. That before breach the plaintiff exonerated them.

3. That the plaintiff did not ship the goods upon the terms alleged.

Shee, Serjt., and *Turner*, for the plaintiff.

Bovill, *Lush* and *Cleasby* for the defendants.

The defendants were ship-brokers, under the firm of F. Young & Co., and in August, 1856, had advertised a ship to sail for New Zealand.

The plaintiff called at their offices and enquired about

(*a*) On the former trial (Vol. I., p. 708) there was a count in trover, on which the Court held, that the plaintiff could not recover as he had indorsed the bills of lading to one Nathan. As regarded the special count, the Court held there *was evidence* of a contract by the defendants, but a new trial was directed, the count in trover to be struck out.

the ship, as to when she would sail, and the rate of freight. The plaintiff was told she would sail on or about the 1st September, and a card or ticket was put into his hands on which the rates of freight were marked, and in which the ship was, with others, described as "F. Young & Co.'s Line." The plaintiff had no further communication with the defendants, but loaded his goods before the 1st September, and sent bills of lading to Auckland.

The ship having been mortgaged, the mortgagee did not allow her to sail; and, in December, the goods were unloaded by the orders of the defendants, under his directions, and re-shipped; in consequence of which, they did not arrive until the autumn of 1858.

The advertisement was as follows:—

"New Zealand.
"Frederick Young & Co.'s Line,
"For Auckland, &c.
"To sail on the 10th August, 1856.
"The barque 'Charlie,' &c. &c.
"For freight or passage, apply to—
FREDK. YOUNG & Co.,
"At their New Zealand rooms."

Not *saying* "ship-brokers."

The card or ticket given to the plaintiff was as follows:—

"Fredk. Young & Company.
"Line of Packets.
"The following ships are now loading, and will be despatched as under:"—

Then followed a list of ships, and among others,

"The 'Charlie' to sail on 10th Aug. 1856."

The bill of lading was signed on the 24th September.

The ship not having sailed, the plaintiff wrote to the defendants, on the 27th October, 1856, in these terms:—

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"Having sent my goods to your vessel, the '*Charlie*,' for Auckland, on the faith of your representation that she would sail about the 1st September, and the vessel being still in the docks, I give you notice that *I shall hold you responsible* for damage I may sustain by reason of delay;" and,

To this the defendants replied: "We have to inform you that the '*Charlie*' will leave the docks on the 5th proximo. We do not accept any responsibility in the matter referred to; it rests with the ship." And, in answer to another enquiry as to the port of discharge, the defendants wrote thus:—

"Our agreement *with the owner* of the '*Charlie*' is, that she shall go to Auckland direct."

The plaintiff admitted that he knew the defendants as ship-brokers, and that he was aware vessels did not sail at the exact times announced. He arranged the freight with them.

Ship-brokers were called, who stated that it was the ordinary duty of ship-brokers to arrange freight, receive bills of lading, and hand them to shipper; but that, if the broker gave an engagement that the ship should sail at a particular time, he was answerable for its not sailing at or about that time.

These witnesses, moreover, stated that they could not tell, from the terms of the ticket or card, whether the defendants were owners or brokers, and that several owners loaded their own vessels as brokers.

One of the plaintiff's witnesses, a broker of experience, acknowledged that he would not have judged, from the ticket, that the defendants were *owners*.

For the defendants, a witness was called, who proved that, for this particular ship, they had acted as brokers; but he admitted that the defendants were owners of ships, and of one of the ships mentioned on the card, and that the

card was one which *might* be issued by them as owners; although, he said, he should have judged from the card that they were only brokers.

Ship-brokers were called for the defendants, who confirmed the *latter* view, stating that the card was in the usual form of cards issued by brokers; but they also admitted that, if the brokers owned a ship, they would issue cards in a similar form.

The defendants themselves were called, and, while stating that persons in the trade would, from the terms of the ticket, have understood that they were brokers, admitted that if they had been owners the card would have been in the same form.

COCKBURN, C. J. (to the jury).—The parties with whom the plaintiff and his agent came into communication, were, no doubt, the defendants. But the question is, whether they were acting on their own behalf or merely as brokers, and as agents for the owners? If, indeed, they held themselves out to the plaintiff as the owners, they could not now say they were only agents. But the question is, whether they did so hold themselves out? And that question seems to come to this: what the advertisement and ticket held out to the mercantile world? If in these documents the defendants held themselves out as owners, then they would be liable. The question then, is, what did those documents mean, and convey, to the minds of mercantile men? That is for you, upon the evidence, to judge.

The evidence is, that *brokers*, whether owners or not (as *sometimes* they may happen to be), always advertise in the forms here used; so that merchants do not understand it as conveying that the brokers are necessarily owners. If the plaintiff, as a mercantile man, must be taken to have understood that the defendants were only acting as agents, they are not liable.

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The *owners* would be liable for what the brokers had announced or undertaken on their behalf, within the scope of their authority as brokers.

Verdict for the defendants (*a*).

(*a*) *Shee* moved in Easter T., but took nothing. See under what circumstances the brokers may be liable if owners, *Cranston* v. *Marshall*, 5 Exch. 395. That where there is documentary evidence not amounting to a *contract* in writing, the effect of the whole is for the jury; see *Wegner* v. *Smith*, 15 C. B. 285; *Smith* v. *Sieveking*, 4 E. & B. 945; *Furness* v. *Meek*, 27 L. J., Ex. 34.

BLYTH AND ANOTHER *v.* SAMUDA.

After Hilary Term.

On a contract to build a steam-boat for the plaintiffs of *iron*, the builder, (the defendant,) having, with their knowledge, substituted in part *wood*; and the vessel having been received and fitted up by the plaintiffs, and after two trial trips taken to a foreign sea-port, and there retained some months, and never returned, but resold at a great loss:—*Held*, that it was for the jury whether there had been an assent to the alterations, or a ratification, by retention for an unreasonable time, or an acceptance of the vessel as altered; and if so, the plaintiffs could not recover damages.

DECLARATION on a contract by the defendant to build a steam-boat, similar to one mentioned in a certain contract by plaintiffs, upon builder's plans to be prepared for the approval of the plaintiffs, and in accordance with the specification set forth at the foot of the agreement, the hull to be built in accordance with the contract, and to be put together in frames of the description or dimensions contained in, and conformably to, the said specification, and to execute in a workmanlike manner, and of the best materials, all the iron work and the other work in the specification mentioned, &c.

Breach, that the ship the defendant built was not constructed according to the specification, and was in parts built of bad and improper materials, and in parts built in a bad and unworkmanlike manner, and divers matters required by the agreement were omitted, and in divers parts the ship was weak and insufficient in strength, and of less value than it would otherwise have been.

Pleas: 1. That the vessel was built according to the agreement.

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2. Setting out the agreement, and alleging that the ship was built in accordance with it, except in certain parts and respects, as to which certain variations, deviations and omissions from the specification, in and during the construction of the vessel, were made by and according to the directions, and by and with the leave and license or consent, of the plaintiffs, or one of them, &c. Issue.

Bovill, Lush and *R. E. Turner* for the plaintiffs.

Sir *W. Atherton*, S.-G., and *Cleasby* for the defendant.

The contract was in June, 1858, between the defendant and J. & A. Blyth. It was for a steam-boat, to be completed in January, 1859. It provided, that if the ship should not be built according to contract, it might be rejected, and the money paid for it recovered, the money being paid by instalments at certain stages, and the plaintiffs to have free ingress, with their agents, to the place where the vessel should be built. It was to be delivered in the *Thames*. The plaintiffs had previously entered into a contract with a company at Mayence to furnish a tug-boat for river navigation, to be delivered at Rotterdam, and this was shown to the defendant, and was the contract referred to in his agreement with the plaintiffs.

The plaintiffs appointed one Harrington to look after the building of the steam-boat, and in December, 1858, having received notice from him of a deviation, in substituting wood deck-beams and "shelves," they wrote to the defendant, telling him that the responsibility of the vessel proving satisfactory to the Mayence Company would rest with him. He answered that the Mayence Company had, in their specification, required wood deck-beams, and that when wooden beams were adopted a wooden shelf was invariably used to attach them to, not an *iron* one. The plaintiffs replied that they were glad the defendant knew these alterations would be satisfactory to the Mayence firm. When completed, *engines were fitted in by the*

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plaintiffs. The steam-boat was then taken over to Rotterdam, when it was found that some of the iron plates had bent and some of the wood-work was broken, and the vessel not being in a fit state to undergo the trials stipulated for by the Mayence Company, they refused to accept it.

The case for the plaintiffs now was, that, through the substitution of wooden "shelves" and beams for *iron*, the vessel had been so weakened that it had not strength to resist the action of the waves, and had consequently bent, or "buckled," causing the injuries referred to, and which made her useless.

But the plaintiffs admitted that the vessel, having been launched in December, 1859, had taken trial trips in April, 1860, which were satisfactory, before the voyage to Rotterdam, and that the injuries occurred in the course of the voyage, which was in June, in rather rough weather. They declared, however, that they had not been fully aware of the substitution of wooden beams and shelves for iron until their arrival at Rotterdam—that is, that they were not aware "of the full extent of the deviation," though, as already stated, they themselves had fitted-in the engines.

The plaintiffs further admitted that there had been time, between December, 1859, and April, 1860, to substitute iron stringers or beams for wooden, had they insisted on its being done, but they had *not* insisted on it.

Harrington, the plaintiffs' engineer, was called, and admitted that he saw the vessel every week, and knew that the wooden beams were being put in, on which account he wrote the letter already alluded to. The company had sent over a director, and also their captain, to inspect the vessel, and they examined it three times and expressed no dissatisfaction.

In July the agents of the defendant inspected the vessel at Rotterdam, and ascribed the injuries to weakness occasioned by the fitting-in of the engines and the violence of

the weather, the ship not being built for ocean navigation (*a*).

In August, 1860, the plaintiffs gave notice to the defendant that the vessel would be hauled up and inspected, and in September an inspection took place. In December the vessel was sold to the Mayence Company for 1,450*l.* The plaintiffs had paid to the defendant the whole price, 5,000*l.* The contract price with the *company* was 12,000*l.*, of which they had received 9,000*l.*

There was a conflict of evidence between the witnesses for the plaintiffs and those which were called for the defendant, as to whether iron "stringers" were better than wooden. The witnesses for the defendant said that this was only so as regarded sea-going vessels, and that the damage would have been greater if iron had been used. And there was a great contest of evidence also as to the cause of the "buckling."

The defendant insisted that his main plea was proved.

COCKBURN, C. J. (to the jury).—The defence is, in substance, that the contract was departed from with the consent of the *plaintiffs*. It is clear that they *knew* of the alterations, and instead of rejecting the vessel, they accepted it as it was built; and if so, and if they assented to the alterations, they cannot now complain. What is the fair construction of the letters which passed between the parties, and of their subsequent conduct? If the plaintiffs' assent to the alterations was *absolute*, of course they are now concluded. If conditional on the approval of the Mayence Company, *was* there not that approval? If so, then the condition was satisfied, and the assent became absolute. And after the inspections by the agents of the company, was it not clear that the company would have accepted the vessel as it was then built and launched? Supposing the plaintiffs assented to the substitution of

(*a*) *Vide ante*, p. 417, as to *insurance* of such vessels.

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wood-work for iron, they cannot hold the defendant responsible for the consequences of the substitution, even assuming that it caused the injuries which occurred. And even if the assent was with a reservation of all responsibilities, or was conditional on the ultimate approval by the Mayence Company, the plaintiffs had no right to *retain* the vessel, after the company's rejection of it, for six months, from June to December, 1860. If you think that was an unreasonable delay, and in that view, even supposing there was no assent to the alterations, the action would not be maintainable. If, however, you are of opinion that there was neither assent to nor ratification of the alterations, and no unreasonable delay, nor acceptance of the vessel, then find a verdict for the plaintiffs, and then consider the question of damages, as to which there is a conflict of evidence, on which you must exercise your judgment.

No doubt the defendant has departed from the specification, and unless there was assent or acceptance or ratification, you must find for the plaintiffs for such damages as you think proper.

The questions for you, then, are—

1. Was the specification departed from?
2. Was there *consent* by the plaintiffs to the deviation?
3. Was there *acceptance* by the plaintiffs of the vessel?
4. Did the plaintiffs retain it an unreasonable time?
5. If not, what are the damages?

Verdict for the defendant (*a*).

(*a*) This case is obviously distinguishable from *South-Eastern Railway Company* v. *Warton*, *post*, on the principle that the fault there was *latent*, and the assent of the plaintiffs' agents fraudulent. Here it was *patent*, and the assent was on the part of the plaintiffs, the *principals*, as well as of the agents.

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Coram Blackburn, J.

After Hilary Term.

LAURANCE *v.* FAUX.

Receipts for rent received by a landlord from a third party, *held*, evidence of a surrender by operation of law, putting an end to the liability of the former tenant.

ACTION against *Robert* Faux, for that *he* became tenant to the plaintiff of a yard and buildings, upon the terms that he would, at the determination of his tenancy, leave upon the premises all the buildings whatsoever at the time of the demise to him, erected or to be erected, in good and tenantable repair.

General averment: of all things, &c.

Breach: that the defendant did not, *at the determination of his* tenancy, leave all buildings, &c. in good repair, &c.

Count: for use and occupation.

Pleas: 1. That the defendant did not become tenant to the plaintiff on the terms alleged.

2. That he did, at the determination of his tenancy, leave the buildings, &c. in good repair.

3. That before breach the plaintiff discharged the defendant from his promise. Issue. Never indebted.

Hayes, Serjt., and *Keane* for the plaintiff.

Digby Seymour for the defendant.

On the 4th August, 1852, the plaintiff entered into a written agreement with *Edward* Faux, brother of the defendant, to let him a house and land at 50*l.* a year, the tenant to do tenant's repairs, and the landlord substantial repairs.

On the 1st October, 1852, the plaintiff entered into a written agreement with the *defendant Robert* Faux, to let him the yard and buildings now in question, a portion of the first-mentioned premises for a year from *old* Michaelmas then next (11th October), and so from year to year at 10*l.* a year, the tenant to keep and leave the buildings in repair, &c. (with the stipulation declared upon), and not to assign the premises without the previous consent of the

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landlord in writing. To this agreement *Edward* Faux was party; by a memorandum at the foot that he consented to transfer his interest in the premises to his brother.

In December, 1857, all the buildings demised by the *second* agreement were destroyed by an accidental fire, and neither party had rebuilt them, nor had the tenant paid rent since Michaelmas, 1857, and declined to do so. No notice had been given on either side to determine the tenancy, but defendant had ceased to occupy.

On the 26th December, 1859, the plaintiff wrote to the defendant to this effect:—"Your term in the premises you took of me expired on the 11th October last, and as you have not paid any rent since the fire, I apply to you for arrears of rent to Michaelmas last, and also to restore the buildings or pay me the value, your contract being to *leave* them in good repair."

On the 27th March, 1860, the plaintiff gave defendant notice to quit at Michaelmas.

Digby Seymour called Edward Faux, who swore that in December, 1855, he saw the plaintiff, told him he was going to have the yard and buildings again, paid him 30*l.*, taking a receipt, produced, in these terms:—"Received of Mr. Edward Faux 30*l.* for half a year's rent of his own house and farm, due Michaelmas, 1855, and also of the yard and buildings, late his brother's, and now again in his occupation." And subsequent half-year's receipts were produced similar in amounts.

Under a Judge's order the defendant had produced receipts given him, of which the latest date was October, 1854, then October 17, 1857—"Received of Robert and Edward Faux 30*l.*, due Michaelmas, 1857, for estates at York;" and May, 1859—"Received of Edward Faux 25*l.* for half-a-year's rent, due 6th April, 1859."

BLACKBURN, J.—These receipts are strong evidence of a

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change of tenancy with the consent of the landlord, amounting to a surrender by operation of law.

Thereupon,

Keane yielded to a

Nonsuit (*a*).

(*a*) See all the cases on this subject cited in *Davison* v. *Gent*, 26 L. J., Exch. 122. The surrender would be itself "a determination of the tenancy" within the agreement (see *Gore* v. *Wright*, 8 A. & E. 118), but then no breach was proved in 1855, or before the surrender.

Coram Cockburn, C. J.

BLENKIRON *v.* THE GREAT CENTRAL GAS CONSUMERS COMPANY (*a*).

1860. *Michaelmas Term.*

After a verdict given, though not *recorded*, it is too late to be nonsuited.

In an action against a gas company for negligently allowing the escape of gas from their main into premises where lights were known to be burning; the case for the plaintiff being, that the gas found entrance through an open window nearly level with the trench from the main, after a hole had been made in the main for the insertion of the service pipe:—*Held*, that even if the jury thought the gas so entered, it was still a question for them whether the defendants' men might reasonably have foreseen it, and were bound to have the window closed.

THE declaration stated that the defendants were engaged in laying on gas to certain premises contiguous to the premises of the plaintiff, and that the defendants or their servants so negligently and improperly conducted themselves in the so doing, that by reason of such negligence the gas escaped from their main into the said contiguous premises, ignited and exploded; whereby the said premises were set on fire, and by the flames therefrom the premises of the plaintiff were set on fire, &c.

Second count: that the defendants wrongfully and negligently caused certain gas to explode and became ignited near to the plaintiff's premises, whereby the same were set on fire.

Pleas: 1. Not guilty.

2. That the defendants were not engaged in supplying gas to the said premises contiguous to those of the plaintiff as alleged.

(*a*) See *Holden* v. *The Liverpool Gas Company*, 3 C. B. 1.

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Hawkins, Karslake, Giffard and *C. Pollock* for the plaintiff.

Bovill, Lush, Keane and *Malcolm* for the defendants.

The "contiguous premises" referred to in the declaration were those of Messrs. Morley, and had been lighted by the gas of another gas company. The defendants had been engaged to supply gas for those premises, and their men on the day of the explosion were engaged on the work necessary to lay the gas on thereto. The pipe from the other gas company ("the Chartered") entered the premises through a hole in the basement, and they even had enlarged the hole, and also made a trench from the wall to their main about three feet distance. Before going further they asked the persons on Messrs. Morley's premises if it were necessary that the gas burners in the basement should be alight? and were told that it was. They then proceeded to tap a hole in the main, for the purpose of admitting the service pipe. There were windows in the basement, through a little hole on the level of the pavement. Close to the hole in the wall was the meter of the other gas company. A little before eleven o'clock a strong smell of gas was observed in the *basement*, and soon after there was an explosion which set the house on flames and set fire to the plaintiff's house adjoining.

The case opened for the plaintiff as regarded negligence was, that the operation of tapping the main to admit the service pipe, ought not to have taken place without a process called "bladdering," which consisted in the insertion of a kind of wedge in the main, below the orifice cut for the admission of the service pipes, so as to prevent the escape of gas through that opening; and it was suggested that there had been a current of gas along the trench and through the hole and window into the basement where lights were burning, which ignited and exploded the gas; that this was a result which might have been reasonably

foreseen, and that as the lights were known to be there, and the simple precaution referred to would have prevented all danger, its omission was negligence which rendered the defendants liable. But the witnesses called for the plaintiff could not go the length of saying that the precaution was general; not that it was done in *many* instances. And skilled witnesses were called for the defendants to prove that it was *not* a necessary or ordinary precaution; on the other hand, some of the witnesses for the defendants admitted, that, under the circumstances, it would have been proper to adopt every precaution to prevent danger of ignition of the gas by means of the lights burning; and that it would have been prudent to close the windows or any other opening into the house before allowing the gas to escape, as it would be certain to ignite after a certain quantity of it had entered the place where lights were burning.

Hawkins in reply relied *chiefly on this.*

[There was some cross-examination of plaintiff's witnesses, with a view to show that there might have been an escape of gas from some of the burners of the other gas company, but the case did not turn on that.]

COCKBURN, C. J. (to the jury).—There are two questions for you. 1. Whether the gas which exploded proceeded from the defendants' main; and 2. Whether in any thing which their servants did, or omitted to do, there was such negligence as to make the defendants responsible. The first point depends on the facts and mainly on this, whether the escape of gas was gradual or *sudden*, for if sudden, it probably was from the hole opened by the defendants' servants in *their* main.

As to the second, the *real* question, you have to determine, is, whether there was negligence on the part of the defendants' men, for if so, the defendants are responsible, that negligence may be either in omitting to do

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something which in the exercise of ordinary care and skill they ought to have exercised; or in the doing an act, dangerous in itself, under circumstances in which it cannot consistent with ordinary care and prudence that it should be done.

The ground of negligence put forth in the opening appears to have been either abandoned or not so much relied upon at the close of the case. The main ground now relied upon by the plaintiff appears to be this, that the whole thing was done with a careless disregard to the safety of the adjoining premises; that care should have been taken to prevent the entry of gas into the premises where lights were known to be burning. And upon that the question is, whether the company's servants did what was necessary with reference to ordinary and reasonable care? That the operation was one of some danger cannot be denied, not only does the *event* prove it, but the witnesses all concur in this, that to allow a quantity of gas to escape into premises where lights are burning was *necessarily* attended with danger of ignition, and must have been known to be so; and those who carry on operations dangerous to the public are bound to use all reasonable precautions—all the precautions which ordinary reason and experience might suggest to prevent the danger. It is not enough that they do what is *usual* if the course ordinarily pursued is imprudent and careless; for no one can claim to be excused for want of care because others are as careless as himself; on the other hand, in considering what is reasonable, it is important to consider what is usually done by persons acting in a similar business. Now it appears that the *hole in the wall* was stopped up, but the window was not closed, and this is the negligence now mainly imputed by the plaintiff; on the other side it is contended, that it was not to be expected that the gas would go through the window. Here two questions arise, first, *did* it do so? and, secondly, ought the men to have foreseen that it might do so? Was

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there a want of proper care and caution in allowing the escape of gas from the main without first closing that window? Morley's men were asked to put out the lights, but this is not an action by Morley, and I do not know that contributory negligence on *his* part would be an answer to the action by the *present* plaintiff. It is for you to consider whether the defendants' servants ought not to have *either* insisted on the lights being put out or have the windows closed. And if they did what was necessarily dangerous under circumstances, making it additionally dangerous, with a want of due care, find for the plaintiff, if not, for the defendants.

The jury were directed as to whether the defendants' gas caused the explosion, but were unanimous in finding that they used all reasonable precaution.

Hawkins applied instantly for a nonsuit; but

COCKBURN, C. J.—That is too late, although the verdict is not recorded.

Verdict for the defendants (*a*).

(*a*) Next term *Hawkins* moved, but the Court were clearly of opinion that the plaintiff was too late in his application for a nonsuit, and that as the case had been rightly left to the jury and was entirely for them, and there was evidence both ways, there was no ground for disturbing the verdict; but the case stood over.

Coram Wightman, J.

TRINDADE *v.* LEVY AND ANOTHER.

1861.
Easter Term.

On a charter to receive a cargo alongside the ship, at a port where the ship cannot safely load *inside* a bar—if she is loaded *outside* the freighter cannot throw extra expense of lighterage on the shipowner.

ACTION for freight.

Plea: never indebted and set-off.

The particulars of set-off claimed 31*l.* for "cash paid for the hire of a felucca to Larache, to take the remainder of the cargo outside the bar for shipment," &c.

Raymond for the plaintiff.

Gray and *Beresford* for the defendant.

The charter was, to proceed to Larache (a port in Africa),

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to receive a complete cargo, so far as the ship can reasonably stow and load, and to receive it "alongside the ship" at that port.

The cause was partly tried upon admissions, which stated, *inter alia*, that Larache was a port with a bar, inside of which it was impossible for the ship to continue long enough to load a complete cargo, by reason of the low depth of water, and that after loading as far as she could *inside* the bar, she went *outside* the bar, to the nearest place convenient for loading, which, however, was at a distance from Larache.

The felucca mentioned in the set-off had been employed to convey the rest of the cargo alongside of the ship at that place, and the charges thus incurred formed the subject of the set-off.

It was contended for the defendant that the master had contracted to receive the cargo at *Larache*, and therefore must bear the extra expense of conveying it to another place; but

WIGHTMAN, J., thought otherwise, and left the case to the jury.

Verdict for the plaintiff(*a*).

(*a*) *Gray* moved in T. T. but took nothing; the Court being of opinion, on the construction of the charter, that the port of Larache did not necessarily mean *inside* the bar, or at the *place* called Larache, that the charter bound the master to receive the cargo alongside the ship, and that this meant wherever at the port of Larache she could safely be loaded, and that the charter could not reasonably mean that the ship was to be loaded inside the bar until she stranded, or that the shipowner was to be responsible for a natural obstacle which must be supposed to be equally in the knowledge of both parties; that even if the freighter was not bound to load there he had *done* so, and could not now throw the extra charge on the shipowner. See *Lindsay* v. *Janson*, 28 L. J., Exch. 315.

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BARNETT *v.* THE CRYSTAL PALACE COMPANY.

Easter Term.

A person having in his possession the goods of another, whom he knows to be the owner, has no right to retain them until he has a written receipt for them.

DETINUE for fittings and effects.

Pleas: *non detinet* and not possessed.

Tozer, Serjt., for the plaintiff.

Mills and *C. Pollock* (with them *Bovill*) for the defendants.

One Haseldon had entered into a contract with the company to have the use of the room where people washed their hands, &c., and for that purpose put up certain fittings, and had certain things, such as towels, utensils, &c. In September he assigned these effects to the plaintiff. In November he left, and another person went into possession, and carried on the business until January. Haseldon, however, had left behind him some of these fittings, &c., and subsequently, the plaintiff, having got from one Grove, the company's manager of the department, his assent to their removal, applied to one Thompson, a servant of the company, who had charge of that part of the premises, to let him have them, which Thompson declined to do, saying at first that he did not know him. Haseldon then went with the plaintiff to Thompson, told him of the assignment, stated who the plaintiff was, and that he was the owner, and appealed to Grove's letter. Thompson, however, still declined to deliver them unless Barnett would give a written receipt for them and show the bill of sale, which he refused to do, and the next day issued the writ in this action. Grove, after the writ, said, "Why did he not deliver them?" but they had not been offered before or after the action.

It was admitted that *Grove* had authority from the company. But a question was made as to the authority of *Thompson*.

On the part of the plaintiff it was insisted that the company were responsible for his acts, as Grove, their manager,

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had referred the plaintiff to him, and left the matter under his actual control, and that there was no right in the company or their agents to impose the condition of giving a receipt for the goods.

WIGHTMAN, J. (to the jury).—1. Had Thompson authority from Grove to give up the goods if a receipt was given, or to retain them if a receipt was *not* given?—Yes.

2. Did Thompson offer to give up the goods if the plaintiff would sign the receipt?

3. Did the plaintiff *refuse* to do so?

As to these latter questions, the jury were discharged, with the consent of the *plaintiff*, who maintained that they were immaterial, but not of the *defendants*, on whose behalf it was contended that they were material.

The jury found a

Verdict for the plaintiff (*a*).

(*a*) In T. T., *C. Pollock* moved but took nothing; the Court being clearly of opinion that there was evidence of Thompson's authority to detain on the part of the company, and that there was no right to retain the goods until a receipt was given, as the plaintiff's ownership was sufficiently made known. It has been held that a debtor has no right to require a receipt; see *Jones* v. *Arthur*, 8 D. P. C. 442. And as to the main question, see the similar case of *Burroughs* v. *Bayne*, 29 L. J., Ex. 185, and *Fothergill* v. *Lovegrove*, *ante*, p. 132.

Coram Blackburn, J.

HAYES *v.* TINDALL.

Easter Term.

A house-agent letting a house for his employer, is liable if he neglects to make reasonable inquiries as to the solvency of the tenant.

DECLARATION, that in consideration that the plaintiff, at the request of the defendant, would employ him as a house-agent, for the purpose of letting or procuring for the plaintiff a tenant for a furnished house of hers, for commission and reward, the defendant undertook and engaged with the plaintiff that he would use due care and attention, as such house-agent, in and about the procuring such tenant, and in and about ascertaining, or endeavour-

ing to ascertain, before letting the same to any person, that such person was a fit and proper, and respectable and solvent person.

Breach, that he did not take due care to ascertain, or endeavour to ascertain, before he let the house to one Evans, that the said Evans was solvent, and let the house to him [knowing (*a*)] that he was not solvent, whereby the plaintiff was unable to obtain her rent, and sustained damage through injury done to the plaintiff's furniture by the said Evans, and in endeavouring to obtain compensation from him, which she failed to do by reason of his not being responsible, &c.

Pleas: 1. That the defendant did not undertake as alleged.

2. That he did use due care, &c.

3. Exoneration, &c.

Ballantine, Serjt., and *Lloyd*, for the plaintiff.

Petersdorff, Serjt., for the defendant.

The plaintiff, having a furnished house, employed the defendant, a house-agent, to let it. There was no express contract between them. He introduced Evans to the plaintiff, telling her he had known him for years, and that he was a respectable man whom she would like as a tenant. In *fact*, the defendant *had* known Evans, and on a former occasion had let him a house on references which he found satisfactory at the time, and now offered to give the plaintiff, but which she dispensed with, being satisfied with the defendant's knowledge of him. Evans's circumstances, however, had since changed, and he had been in difficulties, which would have probably been discovered had inquiries been made, but of which the defendant was not, so far as

(*a*) No attention was given to this word at the trial, and the case was tried as if nothing turned upon it. If the action had been rested on false representation, probably Lord Tenterden's Act would have raised a difficulty.

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appeared, aware. The plaintiff agreed to the letting, and desired the defendant to arrange it, which he did, the terms being a monthly rent payable in advance, the *letting* being for a year. Evans entered and paid *two* months' rent as agreed, but then finding himself insolvent, proposed to give one or two months' notice and to leave, but to this the plaintiff would not agree, and he left without paying anything more. The plaintiff said she had not been able to let the house for the remainder of the year. The defendant had sent her a bill for commission, at five per cent., on a year's rent, which she had paid.

Upon these facts it was contended for the defendant that there was no cause of action, the plaintiff having been satisfied with the defendant's statements, which were made *bonâ fide;* that it was enough if a house-agent introduced a person to his employer *bonâ fide*, and that, at all events, he was not bound to make further inquiries in this particular case.

BLACKBURN, J., left it to the jury whether the nature of the employment was such as that he was not bound to make inquiries, or whether it was such as did impose that duty. If so, then he told them the defendant was bound to use due care to discharge such duty, and left it to them to consider whether he had done so, and whether, by reasonable inquiries, he might not have found out the tenant's insolvency.

Verdict for the plaintiff, 28*l.* (*a*).

(*a*) *Petersdorff*, Serjt., moved in T. T., on the ground that there was no evidence from which the jury could find any such duty, but the Court (COCKBURN, C. J., WIGHTMAN, J., CROMPTON, J., and BLACKBURN, J.) were of opinion that the jury might rightly infer from the very nature of the employment and the payment of the commission, that the duty was not merely to introduce a person without making any inquiries about him, but to make reasonable inquiries; and the rule was refused.

Note.—That the attention of the Court was not directed to the fact, that the defendant told the plaintiff that he had known Evans for years, (which, however, it should seem,

would not have sustained the allegation of the *scienter*,) and the judgment of the Court proceeded upon the ground, that there was a duty to make inquiries. That duty being the ground of action, the breach of it, with or without the *scienter*, would give a right of action not affected by the stat. 9 Geo. 4, which applies only to actions grounded simply on false representations of solvency, apart from duty to *make inquiry*.

Westminster, coram Wightman, J.

WOOD *v.* FINCH.

Easter Term.

ACTION for the price of coals sold and delivered; and for money had and received.

A member and director of a coal club, formed on the principle of buying coals, for *cash* wholesale, out of the *paid up* subscriptions, *held*, not liable for coals ordered on *credit* by the secretary.

Plea, never indebted.

Hannen (with him *Lush*) for the plaintiff.

Barrow for the defendant.

In 1856 a Coal Club was formed, for the purpose of raising by subscriptions, during the summer of each year, a fund, out of which, in the autumn, coals should be purchased wholesale, and supplied to the members according to their respective subscriptions. There was a secretary or manager, and trustees, and a committee; but the actual management was in the secretary. From the evidence of a member of the committee of 1857, it appeared that the subscriptions, as received by the secretary, were paid into a bank in the names of the trustees; that the secretary ordered such coals as he judged would be wanted; that, if he could get the necessary quantity for less than the amount made up by the subscriptions, it was an "off-set," but the witness could not say what became of the overplus of any coals obtained. And the witness and another, called for the *plaintiff*, did not know of any authority to the secretary to pledge the credit of the society; on the contrary, stated that *they* never authorized coals to be ordered until the money had all been received by the secretary. He said, the very object of the club was,

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by paying ready money for the coals, to get them at a cheaper rate; and that, consequently, the secretary had no authority to order coals except for ready money. At the same time, it was stated that the secretary sold coals on his *own* account, and that he bought coals where he pleased; and, so that the club had what they wanted, *sold* as he pleased.

In the autumn of 1857 all the subscriptions had been paid before the 29th September, and the secretary had then ordered a cargo of coals, which arrived in October.

The defendant was one of the three trustees in that year, and they had opened an account at a bank in February, 1857, which continued until March, 1858.

The banker's books were produced, and it appeared that, on the 24th September, 1857, the account was reduced to 31*l.* 11*s.* 11*d.*, having been reduced to that sum by payments of 86*l.* And, in the month of March, 1858, the account was settled by payment to the *trustees* of 19*l.*, the balance due at that time.

It did not appear, however, to *whom* the sums had been paid, which had been drawn out prior to September 29th, 1857.

And it came out that when the cargo arrived the secretary had sold coals out of it on his own account.

There had been no communication whatever between the plaintiff and defendant.

On this evidence, (*the rules not being put in,*)

Barrow, for the defendant, without calling witnesses, submitted that there was no proof of any authority to pledge his credit, and

WIGHTMAN, J., being of that opinion, directed a

Nonsuit (*a*).

(*a*) Reserving leave to the plaintiff to move to enter a verdict if the Court should think there was evidence to sustain such verdict. In E. T. *Lush* got a rule *nisi*. The rule was granted on the authority

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of the following case:—By the rules of a coal-club (duly certified), provision was made for the appointment of a chairman, secretary and treasurer, the latter of whom was to receive all monies taken by the secretary, and to pay the coal-merchant as soon after every delivery of coals as he should receive an order signed by the secretary and chairman. It was then provided that certain weekly payments should be made by the members to the secretary, who were to be entitled at the end of twelve weeks to receive half a ton of coals for each share held by them. It was further provided, that the secretary should, on the requisition of the members present at a meeting, apply for tenders to such coal merchants as they should direct; that, when a tender was accepted at the following meeting, the secretary should agree with the merchant for the required supply,—the coals to be paid for "on the next Thursday night after each delivery, by an order on the treasurer, signed by the secretary and chairman." The plaintiff having tendered to supply the club with about 100 tons of coals, at 23*s.* per ton, the secretary prepared an agreement for "100 tons, more or less," at that price, which was signed by himself and the plaintiff, but, through the default of the secretary, there were not sufficient funds in the treasurer's hands to pay for them.

Held, that the secretary was the mere servant of the general body, and must be taken to have acted in that capacity in giving the order for the coals; that, as the club never parted with their control over the money in the hands of the treasurer, *or authorized the secretary* to expend it, but gave him authority to order the coals for them, and did not furnish him with funds to pay for them, but authorized a contract on credit, the contract so made must *be taken to have been made on their credit*, and consequently the defendant, as a member of the club, was liable. *Cockerell* v. *Aucompte*, 2 C. B. (N. S.) 440. But, the case having been moved by counsel, not present at the trial, the attention of the Court was not directed to the express evidence negativing any authority to contract on credit; and the facts of the cases, in other respects, obviously differ.

RICHARDSON *v.* THE COUNTESS OF OXFORD.

London Sittings. Easter Term.

ACTION for work and materials.

Plea, never indebted.

Knowles and *Prentice* for the plaintiff.

Powell and *Macnamara* for the defendant.

An order to do work on the premises of the defendant, by a person professing to act in his behalf, though having no authority to do so, may be ratified by the defendant's agent, even after action, and it is enough that there is an offer to pay, not only without any acknowledgment, but with a disavowal of the authority.

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The work was done by the plaintiff in rebuilding stables of the defendant, in Cavendish Square, belonging to a house of hers, let to one Deacon, on a term just about to expire. The plaintiff happened to be employed to rebuild adjoining stables, which he found it difficult to do without rebuilding those of the defendant, which were in a ruinous state. He therefore inquired at the house, and was referred by Mr. Deacon's butler to one Harrison, who appeared to have done some jobs for the defendant in the employment of her agent, a Mr. Chichester, but who had no authority to order anything to be done for the defendant or for her agent, both of whom were at this time out of the country. At the suggestion, it should seem, of Harrison, the plaintiff applied to the Metropolitan Building Board, from whom there soon issued an order to rebuild the stables; the notices were sent to Harrison, who thereupon directed the plaintiff to do the requisite work, which he did. There was no communication between either Harrison or the plaintiff and Mr. Chichester, or the defendant; nor did Mr. Chichester know of the work having been done until the bill was sent in for 134*l.* He thereupon wrote to Harrison and received no reply, nor did he himself send any.

Then the plaintiff's attorney wrote, and Mr. Chichester again wrote, to Harrison, but sent no answer. After a delay of some months the present action was commenced, and Mr. Chichester then went to the plaintiff's attorney and said that, although there had been no authority to have the work done, yet, as it *had* been done, rather than have any litigation the defendant would pay it. Costs had been incurred, however, and there was a difference on that head. On a subsequent day he said he would pay, on Harrison's certificate of what was due, and 10*l.* for costs.

The certificate of Harrison had not been obtained, and the money had not been tendered.

Mr. Chichester was called, and his statement was not contradicted, and was to the effect above stated.

Harrison was too ill to attend the trial, and had been examined on interrogatories, which were put in on the part of the plaintiff.

WIGHTMAN, J. (to the jury).—There is no evidence of any authority given by Chichester to Harrison to order this work, or of Harrison being the defendant's agent. The sole question is, whether, after the work was done, Chichester, who *had* authority from him in such matters, adopted or ratified what had been done.

Verdict for the plaintiff, 134*l.* (*a*).

(*a*) In T. T. *Powell* moved for a new trial, on the ground that there was no evidence of ratification, but the Court were of opinion that there was; that the ratification might be after action; and that Mr. Chichester's delay in answering, followed by the promise to pay, proved in this case, was a sufficient ratification. That it mattered nothing that it was accompanied with a disclaimer of the authority, for the very idea of a *ratification* implied the absence of original authority. And that as to the condition about Harrison's certificate, it mattered nothing to the plaintiff, as it was for the defendant's agent to obtain it, if he desired it, or to satisfy himself otherwise of the correctness of the amount, which did not appear to have been disputed.

Coram Blackburn, J.

SWINDEL *v.* JEFFERY.

Hilary Term.

THE first count in the declaration was on a covenant to pay interest, alleging 37*l.* to be due in respect thereof.

Second count, on a promissory note for 100*l.*

The particulars indorsed on the writ were as follow:—

This action is brought to recover 56*l.* 3*s.* 9*d.*

1860.	To amount due on promissory note .			£100	0	0
	To interest on deed .	£37	10	0		
	Cash . . .	81	6	3		
				43	16	3
				£56	3	9

Particulars applying a payment to and satisfying the claim on one count, *held*, that the defendant must have a verdict on that count.

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Pleas: 1. (To first count.)—Payment.

2. (To second count.)—The same.

Udall for the plaintiff.

Day for the defendant.

The issue being on the defendant, and no evidence being given of any payment beyond that which was credited in the particulars,

Day claimed the verdict on the first count.

Udall, contrà, cited Rule 13, H. T. 1853 (*a*); but,

BLACKBURN, J., directed a verdict for the defendant on the first count (*b*), and for the plaintiff for the balance due on the notes in the *second* count.

Verdict entered accordingly.

(*a*) That refers only to the necessity for pleading *payment.*

(*b*) This might have been fatal to the plaintiff's claim for the balance, supposing he was, for any reason—want of stamp, Statute of Limitations, or otherwise—*precluded* from recovering on the other count; and the case is worth noting, to point out the practical importance of the mode of giving credit for payments in particulars of demand.

Court of Common Pleas, coram Williams, J.

London Sittings. Hilary Term.

HOLTEN *v.* JONES.

Defendant having made a charter, as "agent for merchant," and then unknown to the owner re-chartered to a third party (who was ignorant of the former charter), as "agent for owner," but there being evidence that before loading or signing bills of lading, the owner was told of the second charter, and adopted it, and the bills of lading being in the name of the third party, as charterer and shipper, though in fact the cargo was shipped by defendant, and the plaintiff taking a bill for part of freight from the third party, which was not paid by reason of his insolvency:—*Held,* that the question in substance came to this, whether the plaintiff had loaded and acted on the first charter, as if so, the defendant would be liable for the freight, if not, for want of authority.

The plaintiff allowed inspection of letters between defendant and the third party relating to the charter.

THE first count stated, that, in consideration that the plaintiff would enter into a charter-party of a ship of which he was owner, purporting to be between him and the defendant, therein described as "agent for merchant," at a freight of 32*s.* 6*d.* per ton, it being provided that, as the charter was stated to be concluded on behalf of others, the

liability of the defendant should cease when the cargo should be shipped, the defendant promised the plaintiff that he was authorized by some third party to make the charter-party.

Averment, that the plaintiff entered into it on the faith of that understanding, and loaded and delivered a cargo.

Breach: that the defendant was *not* authorized by any one to make the said charter, by reason whereof the plaintiff lost the benefit of it.

Second count, on a false representation of authority.

Third count, for work and money paid, and money received, and for freight for the conveyance in a ship by the plaintiff of goods of the defendant on his request.

The particulars claimed 190*l.* balance of freight, and 17*l.* paid by plaintiff in discharge of a note given by him to defendant.

Pleas: 1. (To the first count.) *Non assumpsit.*

2. That the defendant was authorized to make the charter.

3. That the plaintiff did not load the ship under the said charter.

4. (To the second count.) Not guilty.

5. That the plaintiff did not load the cargo under the said charter.

6. Never indebted.

M. Smith and *Honyman* for the plaintiff.

Phinn and *H. Lloyd* for the defendant.

In May, 1860, the plaintiff being with his ship at Cardiff, employed Ceriez & Co., ship-brokers there, to find him a charter, and they offered him one at 32*s.* 6*d.*, and introduced him to defendant, a colliery owner, as chartered. On the 18th May, a charter-party, to the effect stated in the declaration, was signed by plaintiff and defendant, describing defendant as "agent for merchant;" but it stated that the ship was to load a cargo of the defendant's coals,

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which the merchant bound himself to provide, the cargo to be delivered at Rio, the freight to be paid, one-third on signing bill of lading, by bill or cash, at the merchant's option, remainder by approved bills. The usual commission of 5 per cent. was made payable, and the defendant stipulated with the plaintiff's brokers that they should only have one-third of it, and the defendant the rest.

On the 19th May the defendant sent Eason a charter for the same, and on the 21st it was accepted by him unknown to plaintiff at 33*s.* 6*d.* per ton. In this charter Jones described himself as agent of the ship, and signed "by authority of *Holten*," the plaintiff, but without, in fact, the plaintiff even knowing of it.

On the 5th June, the plaintiff received a cargo, and gave bills of lading as for a shipment by one *Eason*. The cargo was in *fact* shipped by defendant, and plaintiff did not know of Eason until the cargo was shipped. Ceriez offered plaintiff a bill accepted by Eason for 186*l.*, which the plaintiff received. The one-third of the freight would amount to 190*l.*, but, deducting insurance, the amount would be 181*l.* Ceriez explained that Eason had re-chartered the ship at a difference of 1*s.* a ton, and that the plaintiff would be paid the remaining two-thirds at Rio at the rate of 33*s.* 6*d.* per ton, showing him a copy of the re-charter, and asking him to give a note for 17*l.* for the difference of 1*s.* per ton, which the plaintiff did, and gave a receipt for 196*l.* as received from Eason *per* Jones by bill, on account of freight.

In August the plaintiff arrived at Rio, and then heard by a letter, dated July 7th, that Eason had stopped payment while the bill was running.

The cargo was deliverable at Rio to Naylor & Co., holders of the bill of lading, who offered to pay the two-thirds freight but not the one-third, which, however, they remitted to Todd & Co., their agents at Liverpool, subject to the claims of the plaintiff. The cargo was then de-

livered to them. They remitted to Todd & Co. 196*l.* as deposit for the security of the owners of the vessel to claim their right in case the bill given by the shipper *and charterer* (Eason) for one-third amount of freight should not have been duly honoured, which it was *not*. Hence the present action.

KEATING, J., made an order at Chambers, on summons by the plaintiff, that he should be allowed to inspect and take copies of all letters *received by the defendant from Eason* relating to the charter-party, and all letters *written by defendant to Eason* in any way relating thereto.

The plaintiff being called, denied that he had read the second charter until he got to Rio, or that he had noticed the terms of the bill of lading.

Eason was called for the plaintiff, and the letters between him and the defendant were put in, from which it appeared that Eason had employed him to procure a charter, and had received from him bills of lading, sending his bill for the one-third freight.

He swore that he had never heard of the original charter until quite lately.

Ceriez was likewise called for the plaintiff, and stated that the cargo was shipped by defendant, who had told him that the ship was re-chartered at 1*s.* difference, and that this was the reason the note was given for the difference; that he never agreed to cancel the first charter, and that the plaintiff's attention had been called to the fact that the *second* charter was in the name of Eason, but that the captain insisted on taking the *first* charter with him.

Phinn, for the defendant, submitted:—

1. (As to the first count.) That there was no warranty of an authority to contract on behalf of any third party, and that as the defendant might have *sued* on the first charter (*a*) he was contracted with as principal. And that,

(*a*) *Schmalz* v. *Avery*, 16 Q. B. Rep. 655.

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even if it were otherwise, no damage had resulted from the want of authority, for that the only real damage was the nonpayment by Eason of his bill. And further, that the bill was accepted by plaintiff in satisfaction on the second charter, taken in substitution for the first.

2. (As to the second count.) On a fraudulent representation of authority. There was no evidence of *fraud* on the part of the defendant; and, even if there were fraud, no damage had resulted from it, nor had plaintiff shipped the cargo on the faith of the authority.

3. (As to the claim under the common counts.) That Eason was shipper *and charterer*, and so described, and that the plaintiff had notice of the second charter before the loading or signing of bills of lading.

Honyman, for the plaintiff, answered:—

1. That there was a clear warranty of authority; and that, if there was *not*, then that the defendant was liable under the common counts, the contract having been executed by the plaintiff.

2. That there was no plea to raise the question of satisfaction or substitution, and no evidence of it.

3. That there was no answer to the claim on the common counts, the evidence being that the cargo was actually loaded *before* the plaintiff heard of the re-charter.

WILLIAMS, J.—It seems to me that the question of fraud is immaterial, and that the primary question is for the jury; for, if there were a warranty of authority, the defendant would be liable; and if not, and the cargo was shipped under the first charter, then he would be liable under the common count. The plaintiff says, "although there was a sub-charter, I was acting under the *original* charter;" that is, in substance, his case, whether as regards the right of action or the damage. Is it not, then, in the first instance, a question for the jury? reserving the points of law if they become material.

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Phinn then called the defendant, who swore that, before the ship was loaded, he had told Ceriez, the plaintiff's broker, that he had re-chartered the ship at an advanced freight, and that when the bills of lading were signed the plaintiff agreed to adopt the second charter.

WILLIAMS, J., left the case to the jury, on the question, whether the plaintiff had loaded and acted under the second charter or the first.

By consent you are discharged from finding a verdict on the *second* count, as to fraud.

Verdict for the plaintiff for 186*l.* 4*s.*

Court of Exchequer, Guildhall, coram Pollock, C. B.

SOUTH-EASTERN RAILWAY COMPANY *v.* WARTON.

London Sittings. After Hilary Term.

An action maintained by a railway company against a contractor, for not doing brick-work of the specified thickness, although certified to have been so done by the company's engineers, in collusion with a sub-contractor, but the fraud or neglect of the engineers *held* material to be considered in regard to the question of damage, though not affecting the right of action against the contractor (*a*).

DECLARATION on a bond, dated 9th April, 1847, for the sum of 20,200*l.*, conditioned that the obligor would in all things make and complete a certain railway and other works in an indenture mentioned, and the specification and drawings thereunto annexed, in the manner therein directed and described, and would in every respect keep the contracts therein contained.

Breach, that he did not so do, but made default in this, that he did not make three tunnels in the indenture described according to the specification, &c. (*a*).

Pleas: 1. *Non est factum.*

2. Performance of the condition.

3. That after the accruing of the plaintiffs' claim, certain differences having arisen, and being pending, between the plaintiffs and the defendant and H. W., concerning the matters in the indenture mentioned, and the defendant having certain valid unliquidated claims and demands against the plaintiffs, it was agreed between them that the

(*a*) And see the practice as to *particulars* of breaches, p. 459.

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said claim of the plaintiffs and the said claims and demands of the defendant should be settled and satisfied by the plaintiffs paying to the defendant and H. W., and their accepting from the plaintiffs, a sum of money less than they would otherwise have been entitled to receive in respect of their said claims and demands, and that such settlement should be taken in satisfaction of the claims on both sides.

Averment, that the said agreement was fully carried out (*a*).

4. Release.

5. That the breaches arose from the act and procurement of the plaintiffs, in that they prevented the defendant from making the tunnels according to the specification.

6. That the defendant, at the request of the plaintiffs, did work for them, and the plaintiffs accepted it in satisfaction and discharge of their said claim.

7. That by indenture dated 7th April, 1854, between the plaintiffs and the defendant, it was declared that (with certain exceptions which did not nor do in any way affect or relate to the causes of action) the defendant and the plaintiffs had settled and mutually satisfied every claim which the parties then had against each other.

Replications: 1. Taking issue on the first six pleas.

2 (to the 4th, 5th and 6th). New assigning for other breaches on other occasions.

[3. As to the 7th plea,] setting out the deed of 1854, *in hæc verba*, whence it appeared that the defendant had claimed above 28,000*l.* for losses alleged to have been occasioned to him through delay caused by the company, and that this claim had been referred to arbitration, it not appearing that there was any *counter* claim on the part of the company, and the deed containing a recital to the effect stated in the plea. To this there was a demurrer.

4. That the deed was obtained from the plaintiffs by

(*a*) This was not proved.

fraud, covin, concealment and misrepresentation of the defendant and H. W. in collusion with him. Issue.

Lush and *Welsby* for the plaintiffs.

Knowles, Bovill and *Phipson* for the defendant.

The defendant had obtained an order for better particulars of the breaches relied on, which were as follows:—

That the contractors did not construct the Grove tunnel and Strawberry Hill tunnel of the materials specified in the contract and specification, nor did they use in the construction of such tunnels materials of good or sufficient quality, nor put such materials together in a good, workmanlike or proper manner, nor construct the walls or arches according to the contract and specification, but constructed the said tunnels in so unsafe and improper a manner that the plaintiffs were obliged to expend large sums of money in lining such tunnels with additional walls and arches, and that the contractors did not maintain the said tunnels, for the period required by the contract, in good and proper condition, as required by the contract, and left them during all that period so constructed as in these particulars above mentioned (*a*).

These particulars being deemed too general, and BRAMWELL, B., and MARTIN, B., having ordered "further and better," they were re-delivered as follows:—

"That the contractors, in constructing the Grove tunnel and Strawberry Hill tunnel, did not use bricks, mortar or cement of the quality specified in the contract and specification, or of good and sufficient quality, nor build the walls and arches of the tunnels in good and workmanlike, proper

(*a*) A general clause was added, reserving a right to the plaintiffs of availing themselves of any evidence of further breaches or damage which might transpire on the trial. But this was struck out by an order of CHANNELL, B., on the 29th June, after notice of trial, and the learned Baron observed, that the particulars even as they would then stand were rather general, and scarcely sufficient.

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and sufficient manner, nor of the *thickness of four rings*, as required by the contract and specification, nor with the materials nor in the manner mentioned therein," &c.

WILLES, J., held these particulars still insufficient, and directed "further and better" to be delivered, which ran as follows:—

"That the contractors did not construct the walls or arches of the tunnels of the thickness of four rings, as required by the contract, but of the thickness of one ring only, with the exception of some parts of the Strawberry Hill tunnel, in which the contractors put two rings, loose bricks and rubbish, *without cement or mortar*, being used by the contractors in the place of the other two or three rings," &c.

[The contract, as will be seen, required *four* rings of *brick-work* in the walls and arches of the tunnels.]

The plaintiffs declared that they could not give further or better particulars than the above, as they had not taken down the tunnels, though they had cut holes into them to inspect them, and had re-lined them with additional tiers or rings of brick-work.

The contract provided that the tunnels should consist of a brick arch and side walls (of certain specified dimensions), both the arch and side walls to be of the thickness shown on the drawings, viz., four "rings" of brick-work. Where the nature of the ground would, in the opinion of the engineer, permit with safety a less thickness of brick-work to be used in the arch or side walls, a deduction to be made from the contract price of the amount of work saved.

The contractors were, according to the contract, to do the work to the satisfaction of the engineer. "And in case any materials not corresponding with the specification should be brought to the works, the engineer may require the contractors to remove the same," &c. "And in case any part of the works shall have been executed in an im-

proper manner, as regards workmanship or materials, the engineer may require the contractors to remove and re-execute the same."

By the contract, it was provided that the works should be executed under the inspection and control of the company's resident engineer, and to the satisfaction of the engineer and resident engineer. Payments to be made on the certificate of the engineer.

The works were executed under such inspection, and all the payments were made under such certificates of satisfaction, and there was a like certificate of final completion.

There was a clause in the contract, "that if the engineer of the company shall deviate in any respect from the specification, or cause any deviations, the same shall not vacate the contract." And further, that the *contractors* should not be permitted to make any deviations without an order in writing, and the value of any such additions, omissions or deviations should be ascertained according to the schedule of prices, and the amount thereof either added to or deducted from the amount of the contract.

The first-mentioned tunnel was completed in February, 1848, the other in December, 1849.

The works were finished about August, 1851. During the whole time Mr. Barlow was chief engineer and Mr. Richardson resident engineer at the works, and two persons (both since dead), Buttress and Perch, were employed in the two tunnels referred to, under Richardson, to report to him weekly in writing as to the nature, quantity and quality of the work done therein.

By the contract the works were to be maintained by the contractors for a year after completion, and during that period one Mr. Deane succeeded Mr. Barlow as engineer in chief; and he, in the early part of 1852, along with Richardson, inspected the works with a view to the final settlement of accounts. And in October, 1852, he certified about 8,500*l.* to be due to the contractors, "sub-

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ject to such counter claims as the company may have," but of which no more particular mention was made. In December, 1852, he increased his estimate of the amount due to the contractors to a sum of nearly 13,000*l.*, and certified for that sum.

On the 30th December, 1852, the contractors wrote to Deane thus:—

"We agree to accept your final certificate; we abandon our claim to the sum of 3,000*l.*, the balance of the 10,000*l.* (a kind of *bonus* which had been promised by the company); and we agree to have our claim for compensation, as per account, referred to arbitration. * * * It being understood that the balance due under your certificate be forthwith paid, and that no counter claims on either side be advanced beyond our claim for compensation before referred to."

Subsequently the certificate was increased to 13,397*l.*, which was paid, and for which the following receipt was given:—"Received of the S. E. R. C. the sum of 13,397*l.*, being the agreed balance due from the company in respect of our claims against the company, except those mentioned in an account delivered by us to the company, and which claims are to be referred to arbitration, on the terms of our letter to their engineer. 30th Dec. 1852."

There was, as will be seen, a contest of oral evidence as to what passed at the interview when this settlement took place.

In April, 1854, the deed of submission to arbitration was executed (a previous deed to the same effect having proved abortive through lapse of time, in consequence of disputes which took place); and in 1855, before the arbitration closed, the writ in this action was issued, though not *served* until April, 1856.

In the course of the proceedings before the arbitration, the company's engineer complained of the imperfect manner in which the works had been executed, and espe-

cially of the tunnels, which he said the company had been obliged to re-line.

But no claims on the part of the company were, or could be, submitted to the arbitration in regard to these matters; the submission, as already mentioned, being only of claims on the part of the *contractors*. In 1855 the engineer inspected the tunnels, and re-lined them.

In December, 1855, the award was made in favour of the contractors for 7,130*l*., to be paid on the 1st January, 1856, when it was paid accordingly.

The case on the part of the company at the trial was, that the engineer had not done his duty in seeing that the brick-work of the two tunnels in question was done according to the contract; and that it had been found that there had been only *one* or two rings of *brick*-work in the arches, the residue being made up of *loose bricks*, which would not hold together, and so not only did not add to the strength of the arches, but *increased* the dead weight thereon, for which reason they were unsafe, and the company had to re-line them with additional brick-work, the cost of which, 4,750*l*., they sought to recover.

Ashcroft, an engineer appointed in 1854, was called to prove the case, and the result of an inspection he had directed in 1855, by cutting down holes or shafts into the brick-work of the tunnels, at intervals along their whole length. His testimony was confirmed by that of various workmen who had assisted him in the inspection, and who had helped to re-line the arches.

Deane was called, and accounted for his certificates by saying that he took as the basis of his estimates those of Barlow.

Barlow, who was chief engineer up to the time of the completion of the works, was also called, and stated that Richardson, as *resident* engineer, had the chief charge and inspection of the works under him. He denied that he

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had ever authorized less brick-work in the arches than specified.

Richardson had been dismissed by the company, and was not called.

The defendant was called, and stated that Richardson was daily at the works, as were the sub-inspectors, since dead; that he had employed C. and others, by sub-contract, to do the brick-work according to contract, and had paid them on their producing certificates of the engineers that the work was done; and that there was no complaint as to the tunnels until the arbitration. But he did *not state that any engineer had authorized less brick work to be put into the arches of the tunnels.*

The replication of fraud was abandoned.

POLLOCK, C. B. (to the jury).—The contract was for certain specified brick-work, unless dispensed with in a certain way, and then allowances would have been made accordingly.

Collusion between the sub-contractor and the company's engineer or inspector would not alter the company's rights under the contract.

As to the arbitration—the arbitrators could not have considered the present claim, and there is no evidence that they *did* consider it.

There is no evidence of the release, or of the plea of substituted work, or of award and satisfaction, nor of the plea that the plaintiffs prevented the performance of the contract.

The engineer, Richardson, certified work to have been done which had *not* been done, and which he and the contractor for the brick-work well *knew* had not been done.

That fraudulent and collusive certificate could not bind the principals (*a*). It was a mere juggle between their respective underlings. It matters not, as to the *right of action*, whether the defendant was a *party* to the fraud or

(*a*) *Coleman* v. *Riches*, 24 L. J., C. P. 125.

not; but, though the replication of fraud having been abandoned, you are not altogether relieved from that question.

But if the evidence for the plaintiffs is true, the fraud was undoubtedly practised, and the contract was broken.

Then the question will be one merely of damages, as to which the question of the defendant's privity to the fraud might be very material. And it is for you to consider whether, as the plaintiffs' engineers knew of the sub-contract, if by their neglect or fraud the defendant's sub-contractors were allowed to cheat him as well as the company, that should not be deemed to diminish the damages as against the defendant?

The defendant puts his case thus:—"You, the company, had engineers, and I knew that you had. I had to pay for brick-work certified by them. My sub-contractor cheated me. I paid for work certified falsely by your engineers. Had they done their duty this would not have occurred; and you are in reality responsible, at all events to a great degree, for the injury which ensued" (*a*).

That is for you to consider with reference to the question of *damages*, although as to the *right of action* it is not material, for no man can stave off his own responsibility and shift it on another.

Welsby excepted to the ruling that the neglect or fraud of the company's engineers could be considered by the jury in the present action.

POLLOCK, C. B.—They may consider it with regard to the question of damages.

Verdict for the plaintiffs, 3,500*l.* (*b*).

(*a*) *Martin* v. *The Great Northern Railway Company*, 24 L. J., C. P. 209.

(*b*) Cross rules were obtained: by the plaintiffs, on leave reserved, to increase the verdict to 4,750*l.*; by the defendant, for a new trial, on the ground of misdirection, in telling the jury that there was no evidence on the plea of accord, *not* on the ground of misdirection as to the right of action on the one hand, or the question of damages on the other.

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PRICE *v.* THE HONG KONG TEA COMPANY.

Hilary Term.

On strong evidence of general usage, an accountant held that the jury might find that he was entitled to charge at the same rate for his clerks as for himself, even during such portion of the time as he was not himself personally engaged in the work.

ACTION for work and labour as an accountant, the particulars claiming 407*l.*

Pleas: never indebted, except as to 200*l.* paid into Court.

Shee, Serjt., and *J. O. Griffits*, for the plaintiff.

E. James and *J. Brown* for the defendants.

In July, 1850, the company was established, with a capital of 20,000*l.*

In March, 1860, a resolution was carried for an inspector of the affairs of the company, and the plaintiff was appointed inspector.

He commenced his examination of the books, &c. on the 18th April, and concluded on the 16th June. He worked with a clerk. He charged 179 days at 2*l.* 2*s.* a day, making no distinction between himself and clerk's charge, the same uniform rate for the total number of hours for which any of them had been employed, and at the same rate for his clerk's services when he was absent as when present.

The amount of his claim was disputed chiefly on that ground, but partly, also, in regard to the *time* he had been occupied. He gave evidence himself as to both points, and on the former case called the most eminent accountants in London, to show that it was the usual custom to charge one uniform rate for the accountant and clerk, and that 2*l.* 2*s.* a day was a low rate.

They gave divers reasons why this should be, as, that the skill and expense of the clerk were acquired in the service of the master, that in the particular work he acted under the directions and the control of the master, and that the master was responsible for the result.

On the part of the defendants it was contended, that

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the usage was unreasonable, and one or two accountants were called to prove that they had charged a lesser rate for their clerks, but they were far from contradicting the evidence as to the general usage, and admitted that in some cases they themselves had charged higher.

POLLOCK, C. B. (to the jury).—Both points are for you. And as to the first and principal one, the rate of charges, it is impossible to lay down any rule except this, that whenever a certain rate or way of charging is usual and general among the most large class of persons carrying on an employment, it may fairly be presumed to be just and reasonable. There has been here very strong evidence of such a usage in favour of the plaintiff's rate of charges, and nothing to show it so unreasonable that you cannot sanction it.

Verdict for the plaintiff for the entire amount.

Westminster, coram Pollock, C. B.

HATCH *v.* LEWIS.

Easter Term.

In an action against an attorney, alleging that he was retained to conduct the defence of the plaintiff on a criminal charge, and that through his negligence the plaintiff was convicted (not alleging that he was innocent):—*Held*, that the plaintiff, to recover more than nominal damages, must prove that he was convicted *mainly* through the defendant's negligence, and the negligence charged being, not taking the proofs of witnesses who were in Court ready to be examined, but whom the counsel, on the plaintiff's own statement, did not wish to call, and whom the plaintiff did not insist on calling:—*Held*, that the question for the jury was, whether the defendants had done everything which, under all the circumstances, was likely to be of any use; and *quære*, whether the action was maintainable at all.

DECLARATION, that the defendants carried on business as attornies, and that the plaintiff, being in custody on a charge of unlawfully assaulting Eugenie Plummer, and on another charge of unlawfully assaulting Stephanie Plummer, and being about to appear on the said charge before the magistrates, retained and employed the defendants as such attornies for fees and reward, to con-

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duct the case and defence of the plaintiff preparatory to, and on the hearing of the said charges before the magistrates. And that afterwards (*a*) the plaintiff having been committed to prison by the said magistrates to take his trial at the then next session of the Central Criminal Court, the plaintiff further retained and employed the defendants as such attornies, to prepare and conduct and take all proper and reasonable steps in and about preparing and conducting the case and defence of the plaintiff before and during his trial on the said charges, and thereupon, in consideration thereof, the defendants *promised* the plaintiff to use due and proper care, and skill, and diligence in and about the premises for which they were so retained and employed. And afterwards the plaintiff was in due form of law indicted and tried on the said charges. Yet the defendants did not use due care, skill and diligence in and about the said premises or any of them, for which they were so retained and employed (*b*), and by reason of their negligence and not using such care, &c., the plaintiff was committed to prison by the magistrates to take his trial at the Court, and by reason of the defendants' negligence in not using due care, &c. the plaintiff was on his trial at the said Court *convicted* (*c*) of the said charges and sentenced thereupon to two years' imprisonment with hard labour for each offence, the second to commence at the

(*a*) *Semble* a distinct count, with a common breach. See *Hughes* v. *Rees*, 4 M. & W. 204.

(*b*) Supposing the count to have stopped here, would there have been any cause of action? *Could* there have been any damage, had the plaintiff been *acquitted?*

(*c*) This was the *gravamen* and *gist* of the action; *Godefroy* v. *Jay*, 1 M. & P. 236-7. Particulars stated the negligence thus:—1. That the defendants at the hearing took no pains to get proper instructions as to witnesses. 2. That they took on themselves the responsibility of conducting the case at the hearing with imperfect information, and without applying for an adjournment. 3. That as to the proceedings in the Central Criminal Court, they took no pains to examine the witnesses who could have given evidence on plaintiff's behalf. 4. That they did not properly instruct counsel at the trial.

termination of the first (*a*). And by reason of the premises, the plaintiff was not only disgraced and degraded but was put to and incurred great expenses in petitioning the Queen to grant him a pardon, and release him from the said imprisonment; and in prosecuting Eugenie Plummer for perjury committed by her on the said trial, in which prosecution she was afterwards convicted (*b*); and by reason of the premises has been ruined in his professional character and prospects as a clergyman (*c*); and has lost and been deprived of the profits and emoluments he might otherwise have obtained (*d*).

Pleas: not guilty, and denial of the duty, and breach of duty, alleged (*e*).

M. Chambers, Garth and *Gordon Allan* for the plaintiff.

Shee, Serjt., *Lush* and *C. Pollock* for the defendants.

On the 13th Nov., 1859, the defendants were retained by and on behalf of the plaintiff, a clergyman, then lately chaplain of Wandsworth House of Correction, to defend him on the charges alluded to in the declarations, at a

(*a*) The averment that the conviction was by reason of the defendants' negligence does not amount to an allegation of the plaintiff's innocence, for a guilty man might be convicted by reason of his attorney's negligence in not retaining counsel, who would have taken an objection to the evidence, or in not giving notice to produce a necessary document. *Et vide per* C. B., p. 479.

(*b*) On an indictment as to which, *vide post*, p. 474.

(*c*) This could not have been proved, as the plaintiff had *resigned before the hearing*.

(*d*) *Vide supra*.

(*e*) Supposing the declaration to have only contained the allegation that the defendants did not use due care and diligence, without more, it may be doubted whether it would have been good, for that would merely have negatived the *degree* of care which is due; and it is hard to say that the *highest* is *not* due; yet it is only for a *gross* want of care or skill, that an attorney can be sued (see *Bulmer* v. *Gillman*, 4 M. & Gr. 108), and thus the averment that, *through* their neglect, the plaintiff was convicted, *i. e.* that it was such, and *so* gross, as to cause a conviction, which otherwise would not have taken place, seems the *gist* of the declaration. So it seems to have been deemed in civil cases. See *Moody* v. *Dick*, 4 N. & M. 348; *Godefroy* v. *Jay*, 7 Bing. 413; *Reece* v. *Rigby*, 4 B. & A. 202.

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hearing before the magistrates, which was to take place on Monday, the 14th November, the day following.

Those charges had been first made on the 6th October, in a letter from the parents of the children to the Bishop of Winchester, of which his lordship had sent the now plaintiff a copy, and had also sent it to the visiting justices. They had appointed the 28th to inquire into the matter, and on that day he had left home, having resigned his appointment, and kept himself in retirement until, a charge having been preferred before the magistrates, and a warrant issued to apprehend him, he surrendered just before the hearing, and the now defendants were retained to defend him. On the day he had left, his wife had written to the prosecutors a letter, describing him as having left home in a distracted state, on account of the charges made, and begging them not to press them further. She saw the senior partner of the defendants' firm (who, throughout, attended to the matter), and, on retaining him, showed him a copy of this letter. He, as she stated, on looking at the papers, remarked at once, that "the case must go for trial." She now stated that she told him there were witnesses—persons inmates in the house at the time—who could refute the charges. He did not see or examine them, nor take any other steps before the hearing. The inmates were, in addition to the plaintiff and his wife, her mother, two servants, a governess and two young ladies, who happened to be there at the time, and an "adopted daughter," Lucy Hatch, a girl of eight or nine.

The charges made by Eugenie Plummer against the now plaintiff were: 1. That while in the garden with her and Lucy Hatch, he had taken her and put her hand into one of his pockets with a hole in it, &c. 2. That on the night of a certain party in August, he had indecently assaulted her. 3. That for almost every night during the fortnight for which the girls were left at his house by the mother, he had gone up into the room in which she slept (by herself), and

committed indecent assaults. 4. That on various mornings during the same period, he had the girl in his bed when his wife was up, and washing, and there had committed divers indecencies. There was a similar charge as to the younger girl Stephanie. The matters were alleged to have occurred in the fortnight previous to the 24th August, when the children were removed.

The senior defendant attended the hearing before the magistrates and called, at the desire of the plaintiff and his wife, Lucy Hatch, the child who was in the garden at the time of the offence first charged, and in the bed-room on the occasion of the alleged familiarities in the mornings when the girl was in the plaintiff's bed. The defendant also called Mrs. Dillon, the plaintiff's mother-in-law, and two of the servants, but, except Lucy Hatch, they were not present on any of the occasions, and only spoke to collateral matters, and *she* so far confirmed the girl that she said they were both with the plaintiff in the garden on the occasion of the offence first charged, and sometimes left Eugenie with him alone for a few moments while she herself was running about; and it was not disputed that the girl was repeatedly in the plaintiff's bed in the morning, while he lay in it. The magistrates determined to send the case for trial, and, there being no one to bail the plaintiff, he was committed to gaol. The defendants were then retained to defend him, and immediately obtained a copy of the depositions. At their desire, the plaintiff had drawn up a long statement for the information of the defendants, his attornies, giving the names of those inmates of his house who could testify to the facts he set forth. Of this statement the following are the most material portions. It did not state how far the charges were false, and implied that the child had been in his bed while he was in it.

"She said that Mr. and Mrs. —— used to have them in their bed. [Can be sworn to by Mrs. Hatch and Mrs. Dillon.]

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"As to the garden charge, the answer may be made that we were rarely, if ever, in the garden without some others of the party, and mostly Mrs. Hatch. Miss Howe's window, and Mrs. Dillon's, overlooked the garden; and they could state this (*a*).

"As to the bed-room charges: I used to go up very often to wash my hands; generally soon after the children had been put to bed; and Lucy generally called out, 'kiss me,' and Eugenie used to call out, 'come in to me too, Mr. Hatch.' At this time the doors were always wide open.

"Lucy Hatch can state that she was always in my room as I finished dressing, and that she was in the habit of dropping my money, &c., into my pockets, &c."

The defendants prepared and delivered to Mr. Serjt. *Ballantine* a brief for the defence of the now plaintiff, which commenced with a circumstantial statement of the circumstances preceding the hearing, and then gave *in extenso* the plaintiff's own statement. They did not themselves examine, or take the proofs of the witnesses mentioned in that statement. They had a conference with the Serjeant before delivery of the brief, in which they found his opinion was strong not to call witnesses, and after he had perused his brief, they had a consultation, and found his first opinion strengthened (*b*).

The trial of the plaintiff took place at the Central Criminal Court, before BRAMWELL, B., on the 1st De-

(*a*) Not that the child and he were *never*, by themselves, out of sight of the house.

(*b*) Even in civil cases, in which new trials may be had, this is deemed a matter so much within the province of counsel, that counsel's not calling witnesses whom he is desired by the attorney to call, is no ground for a new trial; *Hull* v. *Stothard*, 2 Chit. 267; *Pickering* v. *Dowson*, 4 Taunt. 779; and an attorney is not liable for acting even erroneously, on the advice of counsel, as to evidence (*Godefroy* v. *Dalton*, 6 Bing. 460), which in this case counsel took the responsibility of giving, on the *prisoner's own statement*. See evidence of Ballantine, Serjt.

cember, 1859. The girls, Eugenie and Stephanie, were examined, as was their mother; and Eugenie, in her examination, fixed the garden charge on the *first* day she was left at the house. She also stated that, though the door between her room and the plaintiff's was left open, the outer door was locked; it was not quite clear whether she meant *always*, or on those occasions.

In deference to the desire of the plaintiff's wife the now defendants *had his witnesses in attendance* at the trial (*a*); and, had either he or his counsel desired it, they could have been called and examined.

But the counsel, after hearing the evidence for the prosecution, adhered to his judgment *not* to call witnesses, and the plaintiff did not insist upon it, but submitted to his counsel's judgment (*b*).

No witnesses, therefore, were called on his behalf, except as to character, and he was convicted.

He did not, at the time, prefer any charge of perjury against either of the girls (*c*), nor any complaint against the defendants, but petitioned the Home Secretary for a remission of his sentence on the ground that the witnesses who might have been called would have proved his innocence (*d*).

(*a*) For not having them there, if material, they would have been liable; *Reece* v. *Rigby*, 4 B. & A. 202.

(*b*) It therefore was by his own act or assent that they were not called, and he could not be heard to complain of it; *Wright* v. *Soresby*, 2 C. & M. 671.

(*c*) The usual course has been at once to indict the chief witness for perjury, and on *convicting* him, *then* to appeal to the Crown; and even the *indictment* for perjury, until the witness has been convicted, is no ground for any suspension of sentence; *R.* v. *Haydon*, 1 W. Black. 404.

(*d*) Which, even in a *civil* case, where the witnesses *might* have been present, is no ground for a new trial, it being deemed contrary to public policy to permit a man to take his chance of a trial without calling witnesses, and *then* come for a new trial (*Harrison* v. *Harrison*, 9 Price, 89), *à multo fortiori*, in a *criminal* case, where the witnesses were actually *present*, and the prisoner *declined* to call them.

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The Home Secretary declined to interfere, neither of the witnesses having been indicted for perjury (*a*).

In April, 1860, the girl Eugenie was indicted for perjury, on assignments, on such of which, as went to the substance of the charges, she could only be directly contradicted by the plaintiff himself; and, on such as related to collateral circumstances, chiefly by himself or his wife (*b*), partly confirmed by the other witnesses already alluded to.

On this indictment (*c*) the girl, however, was convicted (*d*). The plaintiff was then released, and, in November, brought the present action.

The case for the plaintiff now was, that in preparing for

(*a*) The conviction of a material witness for perjury has always been deemed in *civil* cases ground for a new trial (*Seeley* v. *Mayhew*, 4 Bing. 561), and in a *criminal* case, for a suspension of execution (*R.* v. *Haydon*, 1 W. Black. 404), provided the conviction goes to the substance of the charge, and utterly destroys the evidence, for if it merely impeaches the credit of the witness, and the case otherwise appears clear against the prisoner, there is no ground even for a stay of execution; *R.* v. *Oldroyd*, R. & R. C. C. 88. And so, even where a new trial is admissible, affidavit of new facts is not receivable except coupled with *surprise*; *R.* v. *Bowditch*, 2 Chit. 278. And the Court will not in a civil case grant a new trial even on the ground of surprise, unless it is made manifest that the new evidence could not be procured on the former trial, and will remove all doubt; *Hartwright* v. *Badham*, 11 Price, 383.

(*b*) Who, of course, could not have been called at the first trial, and, until lately, could not have been called in any trial, in the results of which he was interested.

(*c*) The assignments of perjury being as follows:—1. That the act in the garden took place on the *first day*. 2. That there was a hole in the plaintiff's pocket. 3. That the outer door of the plaintiff's room was locked. 4. That the plaintiff acted as alleged on the night of the party. 5. That he acted as alleged on the second night. 6. That he acted as alleged on every night when the girls were in bed. 7. That he was a quarter of an hour in her bed-room, &c. 8. That he acted as alleged with particularity, and hurt her. 9. That he acted as described in the mornings when she was with him in his bed, &c. There were some other similar assignments, on which, from their nature, there could not be any other contradiction than by the plaintiff himself, and who could not have been called, of course, on his own trial.

(*d*) By a general verdict, so that it is impossible to say on which or how many of the assignments.

his trial (the count as to the defence at the hearing before the magistrates not being pressed) the defendants had not examined the inmates of the house and laid their proofs before counsel, so as to enable counsel to form a proper judgment as to the propriety of calling them. And, to show that it would have been proper to call them, and that it was to be presumed that counsel would have so judged, had their evidence been laid before him, they were now called and examined for the plaintiff as to the evidence they could and would have given at the trial. The plaintiff and his wife were examined as to the conduct of the defendants, &c., but they could not have been examined at the original trial, and the other witnesses could and did only speak as to the garden charge, and as to the collateral point of the outer door of plaintiff's room being kept closed; with the exception of Lucy Hatch, whose evidence, as taken at the trial of Eugenie Plummer, was by consent, on account of her tender years, read from the notes; and who was in the plaintiff's bed-room in the mornings when Eugenie was in the plaintiff's bed. But, as regarded the substance of all the more serious charges, no witness was or could have been called to contradict the evidence of Eugenie, as the matters charged were represented to have occurred between the plaintiff and herself.

To show that, if the witnesses had been called at the original trial, the result would have been an acquittal,

Chambers proposed to call the jurymen who had tried the plaintiff on the original trial, and to ask them, having heard the evidence which had been now given as to what the witnesses could have stated, what verdict they would have returned had such evidence been given at the trial? but,

POLLOCK, C. B., after consulting the Judges, ruled that the jurymen could not be called for that purpose (*a*).

(*a*) The opinion of one conversant in the business of insurance, whether the communication of particular facts would have enhanced

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Chambers then proposed to call eleven of the jury who had signed a memorial to the Home Secretary in favour of the plaintiff, and to ask them as to that memorial, and the grounds of it; or whether, if they had heard such evidence, they would have returned such a verdict; but,

POLLOCK, C. B., refused to allow them to be called for any such purpose.

Chambers proposed to call Sir G. Lewis, the Home Secretary, to prove the memorial presented to him for a remission of the sentence, and the ground on which he had refused to entertain it; and,

Sir G. Lewis attended for the purpose of being examined; but,

POLLOCK, C. B., having consulted the Judges, said they were of opinion that no such questions could be put, even assuming that the Home Secretary would not, as probably he would, object to answer on the ground of public policy (*a*). It could not affect this action.

The clerk of Serjt. Ballantine was called, and proved that the Serjeant was *retained* on the 23rd November, that the brief was delivered on the 26th, and that there was a consultation on the 29th, two days before the trial, which was on the 1st December.

The brief was put in and taken as read. (Its contents have already been stated.) This closed the case for the plaintiff.

the premium, is admissible in evidence; but he cannot be asked *what his conduct would have been in the particular case; Berthon* v. *Loughman*, 2 Stark. 258--HOLROYD. Independently of any other objection, therefore, the question was inadmissible, nor could it have been put in any other way, as by asking whether, in their view, the evidence was material. The opinion of underwriters as to the materiality of communicating information as to a particular fact previously to the effecting of a policy, is not admissible in evidence; *Campbell* v. *Rickards*, 2 Nev. & M. 542. The materiality of such a communication is a question for the jury, not for the witnesses; *Ibid.*

(*a*) As to which, see *Beatson* v. *Skene*, 29 L. J., Exch. 430.

For the defence, it was proved that the defendants saw the plaintiff more than once while he was in prison, in order to confer with him as to his defence, and laid his own statement before counsel.

One of the defendants, who had the conduct of the case, stated that, before the brief was delivered, he had a conference with Serjt. Ballantine at Westminster Hall, resulting in a resolution to call witnesses only as to *character*, and that the plaintiff said he "must be guided by his counsel" on that question.

Various notes, from the plaintiff to his attorney during the course of his trial, were also put in, to show that he never insisted on witnesses being called, save as to character.

Ballantine, Serjt., was called, and stated that he had been strongly of opinion that it would not be wise to call witnesses, and that he stated his reasons to the senior defendant, which he was ready to state now if the plaintiff waived the confidence of counsel; but this

Chambers, on the part of the plaintiff, declined to do.

Ballantine, Serjt., therefore, did *not* state his reasons (*a*). He stated, further, that he knew that the witnesses whose names were mentioned in the brief were in attendance, andh e also knew, substantially, all that they could prove. That he cross-examined the witnesses for the prosecution, and made up his mind finally and firmly in the course of the trial that it would not be wise to call witnesses. That, in this matter, he decided for himself, and exercised his own discretion, without reference to the defendants, deeming himself to be responsible.

POLLOCK, C. B., said, in all cases *counsel* were responsible for the calling or not calling witnesses, having the conduct of the case in Court (*b*).

(*a*) This is perhaps enough to raise doubts as to the policy of permitting such actions. The counsel who *knew* the reasons for the course taken can be precluded from stating them, and the convicted party give his own account of the matter.

(*b*) *Vide supra.*

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Ballantine, Serjt., proposed to state the impression he had formed at the conclusion of the trial, and the grounds on which it rested; but

Chambers objected to his doing so (*a*).

The evidence of the original trial was read at length from the notes.

POLLOCK, C. B., suggested that the indictment of Eugenie should be put in, with a view of showing what were the assignments of perjury, as that would be material in considering the whole case.

The indictment was accordingly put in (*b*).

An attorney was called to prove that it was the duty and practice of attornies retained for the defence of a prisoner to examine the witnesses, and submit their proofs to counsel; but he had never been engaged in criminal cases, and could only speak generally as to civil cases, and as to the *general* duty of attornies to take the proofs of witnesses (*c*); and no other witness was called for the purpose (*d*).

Chambers, in reply, insisted that the defendants had been wanting in due *diligence*, having failed in their duty

(*a*) *Vide supra.*

(*b*) Such evidence would have been admissible, and the Lord Chief Baron took such as was offered, and was ready to take any that might be offered. Thus, in an action against a ship-broker for negligence in effecting policies, the insured having put into his hands a letter from the supercargo of the ship conveying the goods, told the defendant the policies were to be *altered*, and he must do the needful. Held, that *brokers might* be called *to say*, looking at the policies, the invoices of the goods, and the letter, what alterations in the policies a *skilful broker* ought to have made; *Chapman* v. *Walton*, 10 Bing. 57.

(*c*) Which was not to the point; the question being as to the duty, in a *criminal* case, to take the proofs of witnesses whom counsel, on *prisoner's own statement* of their evidence, had determined *not* to call. See *Wilson* v. *Tucker*, 3 Stark. 154, for the nearest analogy in a civil case. But, in a criminal case, is, as regards the accused, peculiar.

(*d*) *Chambers*, in reply, cited some authorities as to the general duty of an attorney in this respect, *sed vide supra.*

to "collect and arrange the evidence" (*a*), and to examine the witnesses (*b*). For this, he contended *they* were responsible; because, had they laid the evidence before counsel, counsel would have called witnesses (*c*), and the jury *must* have acquitted the plaintiff (*d*).

Shee, Serjt., contended that, to sustain the plaintiff's action, the jury must be satisfied of his innocence (*e*).

POLLOCK, C. B. (to the jury).—There can be no doubt that an attorney is liable to an action for any misconduct, or miscarriage, which arises from his negligence. The present action is, so far as my knowledge goes, the very first that has ever been brought in a *criminal* case; and it raises questions of great gravity and difficulty (*f*). It requires, on that account, to be looked at with the more attention.

Consider, first, the history of the case. Look at the mere dates and leading facts. The original charge was on the 8th October, 1859. There was to be an inquiry before the visiting justices on the 28th October. On that day the plaintiff absconded, having first resigned his situation, so that the inquiry never took place. He remained away until a warrant was issued against him.

The effect of this absconding was very strong, insomuch that within living memory it was a question to be tried on an indictment, whether the prisoner had "fled from justice."

(*a*) Chitty's Gen. Practice, III, 839.

(*b*) *Sed vide supra.* The point was, as to the duty of doing so, against the opinion of counsel founded on the client's own statement.

(*c*) *Sed vide* the evidence of Ballantine, Serjt.

(*d*) Thus the counsel for the plaintiff admitted that it was necessary to go that length in order to maintain the action. And it should seem that it was so; for, if the evidence would have left the bulk of the charges untouched, and much weighty evidence unaffected, and the jury might fairly have convicted, there would be no *damnum*.

(*e*) *Vide supra.*

(*f*) *Vide ante*, p. 477, n. (*a*).

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Next, there was the fact that the plaintiff's friends did not bail him, and he was therefore in prison until his trial. His trial was on the 1st December, 1859. The trial of Eugenie for perjury was in May, 1860. The first assignment of perjury was, that the alleged indecency in the garden had not taken place on the *first* day. In her original deposition she did not state that it had, but on cross-examination on the plaintiff's trial had been led to fix it on that day, a day on which several witnesses were able to give evidence to contradict her. That assignment went merely upon the precise *time*. The *second* was as to the hole in the plaintiff's pocket, as to which also witnesses could be called. But as to these charges it is to be borne in mind that the trial for perjury was in *May*, 1860, as to matters occurring in *August*, 1859, not less than nine months before. The third assignment was, as to whether the outer door of plaintiff's bed-room was shut or fastened; she swore it was, but not that it was *always* so; and it may have been so at *some* particular time. As to these matters witnesses could be called in order to contradict her evidence. But as to the other, and all the more serious matters, involving the substance of the charges, it was not possible to call witnesses to contradict her, as they were alleged to have occurred when she and the plaintiff were by themselves; and it seems strange that there should have been assignments of perjury on such matters. For instance, the fourth, as to the indecency in the bed-room on the night of the party. The fifth, as to what occurred in the bed-room on the *second* night. The sixth, as to what was alleged to have occurred every night in the bed-room. The seventh, as to whether he was a quarter of an hour with her engaged as described. On all these and the other similar charges she could have been contradicted only by the plaintiff, who could not have been examined on his own trial. And it is strange that a child of eleven or twelve should have been indicted for perjury on such a

matter as whether a man was engaged with her a quarter of an hour or ten minutes, a few minutes more or less; or whether he *hurt her*. How could she have been contradicted on such a point as *that?*

So as to other matters, too disgusting to mention, which, from their nature *she alone* could know of! And though on certain matters she was, on her trial, contradicted, it was mainly by the plaintiff and his wife, who could not have been examined on *his* trial; and the verdict on *her* trial having been *general*, on an indictment containing so many assignments of perjury, on most of which it does not appear that there could have been two witnesses to contradict her, nor anything but the oath of the plaintiff himself; it is impossible to tell on what assignments her conviction went. Therefore, for these reasons, it appears to me that her conviction has little bearing upon the present action. Neither is it material on the subject of the case, and especially as to calling witnesses, and that he had communicated to the plaintiff the Serjeant's opinion, that it would be best not to call witnesses, for reasons which he also stated, to which the plaintiff replied, that he was sorry for it, as he should have desired to call witnesses, but that he must be guided by his counsel.

A letter from the plaintiff to a friend was put in, in which he said that the charge was one, it was so difficult to refute, that his escape depended on having a number of witnesses, whether on the evidence adduced on *her* trial, the plaintiff would have been acquitted, but whether on any evidence which could and might have been adduced on his trial, and was not adduced through the fault of the defendants, it is probable that there would have been an acquittal. As to which it is important to observe, that the plaintiff himself does not appear to have had a very strong opinion, for having been convicted in December, 1859, and released in May, 1860, he did not bring this action until November, 1860, about a year after his convic-

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tion, and five months after his release. Nor up to that time does it appear that he made any complaint of the conduct of the defendants.

In the present action there is a twofold complaint, as to the hearing before the magistrates, and as to the trial. As to the first, I am of opinion that there is no ground for it, for that any one who saw the girl's depositions would say, as the senior defendant did say, that the "case must go for trial." And the defendants are not responsible for the plaintiff's not being able to get bail.

As to the second and chief complaint, with respect to the trial, it comes to this, that the defendants did not get up the case for the defence with sufficient care and diligence, especially in examining the witnesses, so as to lay their proofs before counsel.

The answer is, in effect, that the plaintiff, by his own conduct, had placed himself in such a position, that any course was full of peril, and that everything was done which could be done, with any reasonable hope of doing good.

You will have to consider, in substance, whether all *was* done which could have been done for any useful purpose, and whether the not doing of anything which might have been done was the cause of the plaintiff's conviction.

The declaration alleges, that by reason of the defendants' negligence he was convicted.

The charge divides itself into two parts:—First, the not calling witnesses at all. Secondly, the not examining the witnesses, so as to be in a position to instruct the counsel retained, and enable him to exercise a better judgment than he was able to do, as to the propriety of calling witnesses. But with regard to the *first*, the question of calling or not calling witnesses is entirely for counsel, and the plaintiff's counsel took the entire responsibility on himself, and the plaintiff himself said, "he must be guided by his counsel;" he did not insist that his witnesses should be called, and his counsel at the time stated to

him the reasons why he did not call them; reasons in which he appeared to acquiesce, and which the counsel was ready to state on this trial. There were, it is easy to see, most grave and weighty reasons. Justice had been evaded; the accused had absconded. When apprehended, he had asked the officer what punishment could be awarded for such offences (the last question one can suppose an innocent man to ask); there was the evidence not of one girl only, but of two—and two of such tender age, that it is impossible to suppose they would have invented the disgusting circumstances to which they deposed; and though on some collateral points they might have been contradicted, on the main charge their testimony could *not* have been contradicted. Under such circumstances it is not to be wondered at that Mr. Serjeant Ballantine advised his client not to call witnesses, who would have opened up a perilous cross-examination and given a reply; nor is it to be wondered at that the plaintiff acquiesced in that decision; nor can he now complain of it.

The charge against the defendants, however, resolves itself into this: that he did not make such inquiries as he might have done, nor make the best or most of the materials for a defence at his disposal. Upon that the question for you is, whether the result of any further inquiries would have been to make it advisable to call Lucy Hatch and the other witnesses, except Mr. and Mrs. Hatch, who could *not* have been called. Upon that you must exercise your judgment on all the circumstances (*a*).

It is to be observed, that the defendants had the wit-

(*a*) Where plaintiff's attorney suffered a cause to be called on for trial, without having ascertained whether a material witness, whom the plaintiff had *undertaken to bring into* Court, had arrived, in *consequence of which he was nonsuited*: held that, in an action against such attorney for negligence, it was rightly left to the jury to determine whether he had used reasonable care in conducting the cause, and they having found that he had not, the Court refused to disturb the verdict; *Reece* v. *Rigby*, 4 B. & A. 202; and see *In re Jones*, 1 Chit. 651, and *Dax* v. *Ward*, 1 Stark. 109.

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nesses in Court at the trial, ready to be called, so that had counsel determined to call them at the last moment, he could have done so. Mrs. Hatch states that the defendants did not examine Lucy Hatch, the principal of the witnesses, who *might* have been called, and yet she *had* been examined at the *hearing*. Mrs. Hatch says, she told the defendants that witnesses were in the house at the time, who could contradict *all* that was said against her husband! But from the nature of the charges that was impossible; the main charges *could* not be contradicted, but only some of the details on collateral points, and then on such points the witnesses who might have been called might have contradicted each other, as two of them actually did on the trial for perjury. What counsel would have had to consider, therefore, even had the witnesses been examined by the defendants would have been, whether it was safe to hazard all for the sake of some collateral contradictions, leaving the whole substance of the charges uncontradicted.

That is for you to consider. The *great* question is, whether the plaintiff's conviction was owing to the want of care and skill in the defendants, or was the result rather of his own conduct in placing himself in such a position.

You must consider, also, the position in which the defendants found the case, when it was put into their hands. The plaintiff had absconded after resigning his situation; and his wife put into their hands a copy of a letter she had written to the prosecutrix, imploring her not to press the charge. You must consider what effect at the outset these things must have had upon their minds, as to the hopefulness of a defence. Nor was this all, the plaintiff admitted that the girl was accustomed to be in his bed in the morning while he was still in it, that was admitted; and it is impossible not to say that it was highly improper that a girl twelve years old should be in or on a man's bed while he and she were both undressed. All these matters

had to be borne in mind, with regard to the hopefulness of a defence or the usefulness of calling witnesses to answer the charges. Above all, the plaintiff had absconded.

That was a *fatal* step, and it had been taken some time before the defendants were retained in the case.

Even should you find for the plaintiff, these things must all be considered with reference to the question of damages, for you must take into consideration how far the plaintiff himself contributed to the injury, if any, which he may have sustained, and how far his own conduct caused the mischief which is ascribed to the defendants' negligence.

The declaration alleges, that by reason of their negligence he was convicted. The plaintiff is not bound to prove that, in order to maintain his *action*. If the defendants' negligence *largely contributed* to the result, they would be answerable for such damages as you might think just under all the circumstances. But if you think that either it would not have been wise to call witnesses, and that, under all the circumstances as they then appeared, it would have been useless or perilous to do so, then find for the defendants.

Chambers excepted, that the right question was "whether the defendants had used due care and diligence in preparing and conducting the case for the defence."

POLLOCK, C. B.—Adding this: Whether the negligence was such as to produce the mischief(*a*). Negligence is nothing without damage (*b*). Was there any good that

(*a*) *Godefroy* v. *Jay*, 1 M. & P. 236; *Godfrey* v. *Dalton*, 6 Bing. 460.

(*b*) Where the declaration alleged that the defendant, an attorney, wrongfully, and without the consent or retainer of the plaintiff, entered an appearance for him in an action brought by D. (a third party) against the plaintiff, and took upon himself to conduct the action, and *such proceedings were thereupon had* that D. recovered judgment, and issued execution, and the plaintiff was obliged to pay the amount recovered and the costs of the execution, and "*by reason of the premises*" was injured in his credit and character: held ill, after verdict, as not showing any damage resulting

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HATCH v. LEWIS.

could have been done by examining the witnesses? if not, then the negligence was immaterial, at all events for more than merely nominal damages.

Verdict for the plaintiff, damages 40*s.* (*a*).

from any act of the defendant; *Westaway* v. *Frost*, 17 L. J., Q. B. 286. It should seem that the action would equally have lain (supposing the facts had sustained it), although the defendants had not been *retained*, but had *volunteered*, and that in neither case would it lie unless it were alleged and proved that the plaintiff was prejudiced by the alleged negligence, which in the present case was not otherwise alleged than by the averment that by reason of the negligence he was convicted. Hence that case confirms those above cited, as showing that the averment was the *gist* and *gravamen* of the declaration. If the plaintiff had been *acquitted*, it is not easy to see what damage there could have been.

(*a*) In T. T., *Chambers* moved on the grounds of rejection of evidence and misdirection as to damages, but the Court, upon consideration, refused the rule. It did not become necessary, therefore, to enter into the grave and serious questions which would have arisen had the plaintiff recovered substantial damages, and had the *defendants* moved for misdirection, on the ground that no such action would lie, in a criminal case, where the accused had his witnesses in Court, acquiesced in the decision of counsel not to call them (a decision founded on *his own statement* of the *case*, and of their evidence), and, finally, sued, without alleging his innocence of the offence of which he had been convicted. Had he averred his innocence, then supposing the allegation to have been material (as, it is submitted, it would have been), it might have been traversed, and both the girls might have been examined, as well as the plaintiff and his wife, and the jury would at least have had a far fairer opportunity of judging of the matter than the jury who convicted Eugenie of perjury. And it is conceived that the omission of the averment was fatal, because on grounds of public policy it would be dangerous to allow a *guilty* person, duly convicted, to sue any one either for malice in the prosecution or negligence in his defence. He *cannot* sue for malice, and it seems a strange ground of action for a guilty man, that, by some industry in dealing with witnesses, or taking legal objections, he might have escaped conviction, and thus defeated justice. Beyond all doubt a guilty man may be convicted through negligence, and, perhaps, to hold such an action to lie would be to open a *very wide door*.

1861.

Middlesex Sittings. Easter Term.

Coram Channell, B.

SHINGLER *v.* HOLT.

A married woman may maintain a claim on an interpleader issue, in which the issue is, whether the goods are her's as against the execution creditor.

INTERPLEADER issue, the plaintiff being claimant, the defendant judgment creditor; and the issue, as amended at the trial, being whether the goods were the goods of the claimant, the plaintiff, [as against the execution creditor, the defendant (*a*)].

G. Denman and *Lord* for the plaintiff, the claimant.

Chambers and *Griffits* for the defendant, the judgment creditor.

The plaintiff had been for many years married to one Boddy, but had lived separately, he being in service. In January, 1857, they having disagreed, he caused the house in which she lived to be stripped of the furniture; she, with money supplied by her friends, furnished another house, and got her living by nursing and letting lodgings, from time to time increasing her stock out of her savings. An intimacy subsequently took place between her and one Grover, the execution debtor; and in May, 1858, they were cited in the Divorce Court. In December, 1857, she had gone into furnished lodgings, and warehoused her furniture, paying the warehouse rent. In August, 1859, she removed it to Grover's house, where she resided with him. The plaintiff, an attorney, had been instructed by her and Grover to defend them in the divorce suit, and was, of course, aware of her marriage. In December the claimant's husband, Boddy, obtained a decree *nisi* for a divorce *à vinculo matrimonii* (*b*). Before the decree ab-

(*a*) These words were taken as added at the trial.

(*b*) The 23 & 24 Vict. c. 144, s. 7, enacts, that every decree for a divorce shall, in the first instance, be a decree *nisi*, not to be made absolute till *three months*, &c., during which time any person may show cause why the decree should *not* be made absolute by reason, &c. The decree *absolute* recited that no cause had been shown, &c. It was *after* the seizure, but before the interpleader issue was tried.

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solute she purchased, with her own monies, certain other goods, some carpets, including the goods in question, which had been seized in February last on a writ of *fi. fa.* against Grover (*a*).

The claimant thereupon took out an interpleader summons (*b*) in her maiden name, making an affidavit, dated

(*a*) A *feme covert* living apart from her husband under sentence of separation, with alimony allowed *pendente lite* in the Ecclesiastical Court, having brought trespass in the name of her husband against wrong-doers, for breaking and entering her house and taking her goods, the Court refused, on the application of such defendants, to stay the action, though supported by an affidavit of the husband (who had not released the action, nor applied to be indemnified against the risk of costs), that the action was brought without his authority; *Chambers* v. *Donaldson*, 9 East, 470. Supposing the goods all bought after the *final* decree, it is clear that the wife might have sued the sheriff, and so of a decree *avoiding* the marriage. A man and woman had been married and were cohabiting together. Goods, which had belonged to the woman before the marriage, were seized and sold under an execution against the man. The woman afterwards discovered that the marriage was void; held, that she might recover in trover against the sheriff the full value of the goods, though exceeding the price for which they were sold; *Glasspool* v. *Young*, 4 M. & R. 533. Where an action is brought (without the authority of the husband) in *the name of husband and wife*, for an injury to the latter, the husband is only entitled to stay the proceedings until he receives an indemnity against costs; *Harrison* v. *Almond*, 4 Dowl. P. C. 321; 1 Har. & Woll. 519.

(*b*) By 1 & 2 Will. 4, c. 58, s. 6, reciting "that difficulties sometimes arise in the execution of process against goods and chattels, by reason of claims made by assignees of bankrupts and other persons not being the parties against whom the process has issued, whereby sheriffs and other officers are exposed to *the hazard and expense of actions*, against which it is reasonable to afford relief and protection," it is enacted, that where *any such claim* shall be made to any goods or chattels taken, or intended to be taken, in execution, or to the proceeds or value thereof, the Court from which the process issued, upon application of such sheriff or other officer, made before or after the return of such process, and as well before as after any action brought against such sheriff or other officer, may call before them by rule, as well the party issuing such process as the party *making such claim*, and thereupon exercise, for the *adjustment of such claims*, and the relief and protection of the sheriff or other officer, all or any of the powers thereby given, and make such rules and decisions as *shall*

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7th March, that she was a single woman, having obtained a decree of divorce. The affidavit, in answer, stated that the decree was only *nisi*. The execution creditor neither then, nor at any other time, asked that the husband should be made a party, but asserted that the goods were Grover's.

Thereupon the present issue was directed.

The plaintiff and the parties from whom she had purchased the goods were called to prove that she had bought them with her own money, or on her own credit, and, as to some of the articles, *after* the decree *nisi*.

Chambers cross-examined the plaintiff to show that the goods were really Grover's; and contended, at the close of the plaintiff's case (calling no witnesses to contradict her), that the form of the issue threw the affirmative on her, and that she had failed to sustain it, her marriage being admitted, and not being dissolved; that the execution creditor could set up her husband's right, and that *he* was the owner of the goods (if Grover was not), although he had done nothing to reduce them into possession, citing *Gadsden* v. *Barrow* (*a*).

appear to be just; and the costs of all such proceedings shall be in the discretion of the Court. Hence the mischief of the act is "*hazard*" of "actions," not saying at the suit of the very person making the claim. And, beyond all doubt, the wife may sue, using her husband's name, even before any decree of divorce, (*vide supra*;) and so might a *cestui que trust* in the name of trustees; as, in the case of husband or wife, in respect of her furniture settled for their joint use. There must, however, have been an *actual* claim, and mere *notice* of one is not sufficient; *Isaac* v. *Spilsbury*, 10 Bing. 3; *Bentley* v. *Hook*, 2 C. & M. 426.

(*a*) 9 Exch. 514. But in *Edwards* v. *English*, 26 L. J., Q. B. 195, the Court said, "the substance of the issue, which is merely to inform the conscience of the Court, is, whether the execution creditor had any right to seize, and not to ascertain the strict legal rights of all parties." So in *Green* v. *Stevens*, 2 H. & N. 147, *per* BRAMWELL, B., "The plaintiff must make out his title, but he may do so by showing that he has such a right to the goods that they cannot be taken from him by the execution creditor." *Belcher* v. *Lloyd*, 6 C. iB. 608; *Green* v. *Rogers*, 2 Car. & K. 148.

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Denman, contrà, cited *Edwards* v. *English* (*a*).

CHANNELL, B.—I will give leave to move on the main question, but will also amend the issue so far as necessary in point of form, as of course the plaintiff cannot recover by the name of Shingler.

Griffits (for *Chambers*) went to the jury on the question whether the goods were *Grover's*.

CHANNELL, B. (to the jury).—The real question is, whether the goods are the goods of the plaintiff *as against the execution creditor*. Therefore, supposing the plaintiff a single woman, were the goods her's or Grover's, for the purpose of an execution against him? Distinguish between the goods bought before and after the decree *nisi* if you think it necessary to do so.

Verdict for the plaintiff (*b*).

(*a*) *Vide ante*, p. 489.

(*b*) *Chambers* obtained a rule on the ground that the goods were not the separate goods of the plaintiff; that they were the goods of Boddy; and that at the time of the claim the plaintiff was his wife and was not named Shingler. But in T. T. the rule was on argument discharged, the Court not deciding as to the effect of the decree *nisi*, but holding that the verdict was right, on the issue as it went to trial, the defendant not having made the husband a party to the issue.

WEBSTER *v.* BLACKMAN AND WIFE.

Middlesex Sittings. Easter Term.

In an action against an executor, the only plea being *plene administravit*, the plaintiff must begin, and give *some* evidence of assets, and cannot in reply call *general* evidence in proof of assets.

ACTION against a married woman, an executrix *de son tort*, for money lent to the intestate, her son.

Plea: *plene administravit.*

Kenealey for the plaintiff.

Collier and *Lewis* for the defendant.

CHANNELL, B., ruled that the plaintiff must begin and

A duly registered bill of sale from the deceased may be set up by the executor *de son tort*, if *bonâ fide*, though possession was not taken until after the death, but for any goods not included in the bill of sale he must account as executor.

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give *some* proof of assets in the hands of the executrix, that then it would be for her to discharge herself, and that the plaintiff could not, *in reply*, call *general* evidence in support of his case, and in proof of assets to a greater amount than accounted for, though he might, to contradict any particular piece of evidence (*a*).

Kenealey thereupon gave some evidence of assets in the hands of the intestate at the time of his death, consisting of cabs and horses, he being a cab proprietor.

Collier called the defendant to show that she had not received more than sufficient to cover personal expenses and rent in arrear: and that as to the stock, it had been assigned to her by the intestate by bill of sale, duly registered, as security for advances to the amount of 600*l.*

The registry was proved by an office copy.

Kenealey objected, that it was necessary to call the attesting witness, to show that the bill of sale was made on the day on which it bore date; but

CHANNELL, B., ruled that it was not necessary to call the attesting witness.

Kenealey objected, that it was necessary to show that the defendant had taken possession of the stock during the intestate's life, as otherwise, being executrix *de son tort*, and therefore not entitled to *retain* for a debt, she could not, after the death, *acquire* a lien, though if she *had* it she might keep it; but

CHANNELL, B., held, that the not taking possession could

(*a*) Where plaintiff, who sued as indorsee of a bill of exchange, relied, in the first instance, upon a *primâ facie* case by evidence of the indorser's handwriting, evidence was given for the defence (on a plea traversing the indorsement) to show that the plaintiff was too poor to have given value for the bill, and had disclaimed all knowledge of it: held, that plaintiff could not give evidence in reply, that he was able to give value and had actually discounted the bill, because such evidence was not in contradiction, but merely confirmatory of his *primâ facie* case; *Jacobs* v. *Tarleton*, 11 Q. B. 421.

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be only material as evidence of fraud; but that for any stock not specified in the bill of sale the defendant must account as executrix.

Kenealey cross-examined to show fraud, and also to show that certain stock was acquired *after* the bill of sale.

Verdict for the plaintiff.

Judges' Chambers, coram Bramwell, B.

LANDS *v.* HUNT.
BRATTON *v.* HUNT.

1860.

Quære, whether a Judge can consolidate several actions against the same defendant for obstructing a public footpath.

THIS was an application on the part of the defendant to consolidate the two actions.

The declaration in both cases was for stopping up a public footpath, and obstructing the right of way. There was an allegation of special damage in each declaration.

H. F. Gibbons, in support of the application.

C. W. Wood, contrà.

BRAMWELL, B., doubted whether he had no power to make the order asked for, but said the application was so reasonable, and the terms offered so fair, that he did not see how the other side could object.

Order that plaintiffs be at liberty within a week to select which action shall be tried, other to be stayed, defendant agreeing to be bound, in action not tried, by verdict in other, if to satisfaction of Judge, and to suffer judgment by default if plaintiff recover in action. Defendant to plead one set of pleas, and pleas to be taken in action to be tried. Costs of summons to be plaintiffs' costs in the cause. (See case.)

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Court of Queen's Bench, Guildhall, coram Cockburn, C. J.

London Sittings, Trinity Term.

OAKFORD *v.* DRAKE AND OTHERS.

The plaintiff, broker for the defendants, having bought cotton in his own name, to be consigned to them for sale, on an undertaking on their behalf by their agent that he would make advances to meet the plaintiff's bills for the price, to be drawn on certain parties through whom he consigned the cotton to the defendants; and these parties having failed after the shipment of the cotton, and before payment of the bills:—*Held*, that the question was, whether the defendants' agent had in fact made the advances *bonâ fide*, and that if he had, and had not undertaken to see that the cotton was paid for, the plaintiff, though entitled to all the rights of a vendor, could not stop *in transitu*, nor recover the value of the cotton from the defendants.

DECLARATION for money had and received; and on a special count stating, that the plaintiff was a broker and cotton buying agent at New Orleans, and in consideration that the plaintiff would buy and pay for, and ship, for Maconochie and Co., to Liverpool, cotton for which the plaintiff was to be repaid by the drafts of the plaintiff upon, and to be accepted by them, the defendants agreed with the plaintiff, and promised him, that the drafts should be duly accepted by them, and that the defendants would undertake that the drafts were paid at maturity.

Averment, that he did buy and pay for, and ship for them, cotton in pursuance of the said agreement, and drew drafts upon them for the price.

General averment. Breach, that, though they duly accepted the drafts and paid some of them, they did not pay other of them at maturity; nor at all, and did not accept nor pay other of the drafts.

Third count, on a false representation, that the plaintiff might safely deal with Maconochie and Co. There were also five other counts in trover for the conversion of as many cargoes of cotton in so many ships.

Pleas: never indebted, non assumpsit, not guilty, and not possessed. And, to the second count, traverse of the shipment on the terms alleged.

Bovill, *Manisty*, and *Milward* for the plaintiff.

Lush, *Mellish*, and *Honyman* for the defendants.

The action was, in effect, to recover the value of five cargoes of cotton, value 50,000*l*.

Under the first count for money had and received, the plaintiff delivered particulars, claiming the proceeds of *two* of the five cargoes—the others not having been *sold* when the action was commenced. For the rest he claimed either under the special count, or the counts in trover.

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OAKFORD v. DRAKE and Others.

Originally several actions were brought by the plaintiff against the captains of the ships or the cotton brokers or warehousemen, in whose hands the cargoes had been placed; but these actions were consolidated by an order made by consent, the parties to the other actions abiding the result on each of the separate counts in trover respectively.

The defendants had obtained *delivery* of all the cargoes except *one*, which had been stopped in the docks at Liverpool, and which would await the result of the verdict in the present case.

The action had been commenced in January, 1860, but had been delayed by commissions to examine witnesses abroad, and there was hardly any *oral* evidence in the case, except that of the plaintiff and De Visser, the agent for defendants in the transactions in question.

The defendants were merchants and commission agents in London and Liverpool, engaged in the cotton trade, and De Visser acted as their agent in America. The plaintiff was a cotton buyer, who had been engaged to buy cottons for Maconochie and Co., in the Southern States: and whose course of business had been to buy in his own name, draw bills on Maconochie and Co. for the price, and discount them with the bankers at New Orleans or elsewhere, wherever the cotton might be purchased, and with the proceeds he would pay for the cottons. The bills would pass through the hands of the bankers to Maconochie and Co., who would accept and ultimately pay them. The cotton would meanwhile be shipped, and the bills of lading signed, deliverable to the order of the plaintiff, who would then indorse the bills of lading to Maconochie and Co., at New York; the intention being that *they* should send the cotton to the defendants, who should sell the cotton under their orders.

Maconochie and Co. would, when the bills of lading arrived at New York, draw bills on the defendants for the value, and would discount the bills so drawn in New York

in order to raise funds for the payment of the bills so drawn on them for the price of the cotton, and then they would indorse the bills of lading to the defendants.

In July, 1858, De Visser, being the agent of the defendants, with full power to represent them, and that being the second season for buying cotton since the arrangement had been entered into between the houses, there were bills to a considerable amount coming due on Maconochie and Co., which they were not prepared in funds to meet. De Visser then arranged with them to advance them funds for the purpose: and an arrangement was then entered into between him and the plaintiff as to the buying and shipping of cotton for the defendants, on which the present action was brought.

The plaintiff and De Visser who were both called differed entirely in their versions of the conversation which then took place between them, and in which the arrangement was entered into. The effect of it, according to the plaintiff's account, was that De Visser, on behalf of the defendants, gave the guarantie declared on, that they would see that funds were provided to meet the bills drawn on Maconochie and Co., for the cotton to be bought by the plaintiff at New Orleans and elsewhere, in his own name, to be shipped to Maconochie and Co., and by them consigned to the defendants. It was admitted that, whatever the arrangement might be, De Visser acted in making it as the agent of the defendants, and was their agent for the purpose of making it. It was also admitted that the plaintiff, who purchased in his own name, was in the position of vendor, and had the rights of a vendor, including that of stoppage *in transitu* (*a*).

The plaintiff stated that De Visser told him the arrangement by which he was to advance Maconochie and Co. money, and that they had a letter of credit for 10,000*l*.,

(*a*) *Hawkes* v. *Dunn*, 1 Cro. & J. 519.

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which they have never used, and which is still available. And that he, the plaintiff, then said to De Visser "you must see that when Maconochie and Co. sell the cotton and send it forward" (to the defendants), "they apply the money in taking up my drafts on them against the cotton;" and that De Visser said, "I will see that your bills are paid." This latter part De Visser denied, admitting the former. It was not denied that Maconochie and Co. had been furnished with sufficient funds to meet the bills drawn by the plaintiff, for the cotton shipped to them, and by them consigned to the defendants, under the arrangement thus entered into between the plaintiff and De Visser. But Maconochie and Co. having failed after the cottons were shipped to the defendants, the bills drawn by the plaintiff had not been met. The plaintiff came to this country, and gave notice to the captains of the ships, as they arrived, to stop the cargoes, and the present action, brought nominally by him, but really by the original sellers of the cotton, under their indemnity, was brought to recover the value or proceeds. The defendants having sold the cargoes after such notices from the plaintiff as above mentioned, which, it was admitted, was in time to operate as a stoppage *in transitu*, supposing he had a right to stop as against the defendants; and on the part of the plaintiff it was contended that he was entitled to recover, either on that right, or on the guarantie. On the part of the defendants the guarantie was denied, and the right to stop disputed; the defendants having taken the bills of lading *bonâ fide* and for full value.

The case for the defendants was that De Visser only undertook to make advances on the bills of lading according to the usual course of business; and that he had done so to the full value of the whole: and that though Maconochie and Co. had not applied the advances to the payment of the bills drawn for the cotton, De Visser was no party to this misconduct on their part, and that the bills of lading were indorsed to the defendants *bonâ fide*, without

notice of the insolvency of Maconochie. It was not denied that the advances to the full amount had been made, but it was suggested that on the 22nd of November, 1858, when the bills of lading were indorsed to defendants, their agent had notice that on the day before one of the bills drawn on Maconochie and Co. had been dishonored; and that De Visser all along was aware of their condition, and knew that the funds he supplied would not be appropriated to the payment of the bills for the cotton. De Visser swore that the advances were made in August, September, and October, to an amount exceeding the value of the cotton, and that he did not know to what purpose Maconochie had applied the advances.

Maconochie having been examined by commission stated, that at or about the time the bills of lading were handed to De Visser, he told him that the cottons were not all paid for.

As regards the last two of the cargoes in particular, the plaintiff contended that there was evidence from the circumstances that the defendants' agent, when he took the bills of lading, knew that the bills drawn in respect thereof would not be met, and were in fact dishonored.

At the close of the case *Bovill* abandoned the third count, (founded on misrepresentation,) as both parties it appeared knew the state of Maconochie and Co. equally well at the time of the transaction.

COCKBURN, C. J., pointed out, that the count on the guarantie and the counts in trover, founded on the supposed right to stop *in transitu*, were distinct and independent grounds of action.

Bovill admitted that this was so, but contended that if the guarantie, as alleged, was sustained, as it was not pretended that it had been carried out, the defendants could not set up the bills of lading. And that if the advances were not *bonâ fide*, the plaintiff was entitled to recover on that ground, dishonored bills not preventing stoppage *in transitu* (*a*).

(*a*) *Feese* v. *Wray*, 3 East, 93.

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COCKBURN, C. J. (to the jury).—1. Did the defendants' agent undertake not only to make advances, but to see that the funds should be applied in payment of the bills drawn for the price of their cottons? or that they should be paid? or was there a misrepresentation of his belief that the money would be so applied? 2. As to any of the cargoes, were the advances made otherwise than *bonâ fide*, *i. e.*, with a knowledge that Maconochie and Co. were insolvent, or that the bills drawn for the cotton had been dishonored?

Verdict for the defendants (*a*).

(*a*) The plaintiff did not move.

Sittings after Trinity Term.

REGINA *v.* FIELD (*a*).

On the trial of an indictment for non-repair of a highway, counsel for the defendant not allowed to sum up.

INDICTMENT for obstructing a highway.

Plea: not guilty.

At the close of the examination of the defendant's witnesses, *Ballantine*, Serjt., for the defendant, claimed the right to sum up his evidence, and cited and relied on *Reg.* v. *Broke* (*b*).

Keane, contrà.—I was counsel in that cause for the defendant. The report in 1 Fost. & Fin. conveys an inaccurate impression. What really occurred was this. The cause came on last at the assizes, and Mr. O'Malley, who led for the crown, suggested to me that as I had sufficiently opened the nature of the defendant's case by the line of cross-examination I had adopted, I should not make a speech to the jury in opening my case. To this I objected, on the ground that it was a criminal and not a civil case, and that I had no right to sum up; and therefore if I

(*a*) Reported by F. Philbrick, Esq. (*b*) 1 Fost. & Fin. 514.

adopted his suggestion, I should lose my right to make a speech at all.

The LORD CHIEF BARON, who was trying the cause, then made an observation to somewhat of the purport of his reported remarks (*a*), and gave me leave if I chose to

(*a*) The case of *Regina* v. *Broke* occurred in 1859; and if there were any difference between Keane's statement of it and the report furnished by counsel from notes taken at the time, the latter would perhaps be more likely to be correct. But in truth there is no difference. The learned reporter states, in substance, what Keane states as above, that "at the close of the case for the prosecution, Keane for the defendant asked the Chief Baron if he should be allowed to sum up the evidence as in a civil cause" (the words of the section of the C. L. P. Act, 1854, s. 18, being, "that upon the trial of any *cause*," &c.), and Keane states that the Chief Baron did say something to the effect reported, viz., "This is in reality a cause, and the defendant ought to have the same rights as in a civil action." The report states the result of the case exactly as Keane states it, and merely gives the *opinion* of the Lord Chief Baron upon the point; in which, perhaps, there may be more difficulty, when it comes to be discussed, than appears to have been supposed. Beyond all doubt, in the more ancient writers the word "cause," or "action," included criminal as well as civil suits (*vide* Bracton, lib. iii. c. 1), and a very large meaning has been given to the word in statutes relating to procedure.

Hale, in his "Pleas of the Crown," always speaks of indictments as "criminal *causes*" (vol. 2, p. 160). And in the Index there is this passage, under the head of Certiorari: "Criminal *causes* not capital, as indictments for riots, may be removed into B. R. by certiorari," &c. No doubt, action and indictment are different remedies (*Johnson* v. *Clay*, 1 B. & P. 191), but so are different actions, as replevin and trespass, the one being a specific remedy, the other only compensatory. And an indictment for non-repair really comes to a specific remedy to enforce the repair, judgment being commonly respited until, or discharged upon, repair: or a nominal fine imposed on a plea of guilty (*Reg.* v. *Loughton*, 3 Smith, 575; *Reg.* v. *Luscombe*, 2 Chitt. 214). The Court will not entertain an application for setting aside an award founded on an indictment at the assizes for not repairing a road, though the question in dispute be of a *civil* nature (*Reg.* v. *Cotesbach*, 2 D. & R. 265). But this implies no more than that, technically, it is not a *civil* cause, and does not show that, especially when in a civil court, it is not a *cause*.

On the other hand, in indictments for misdemeanors in cases of private prosecutions, when both the defendant and the prosecutor have brought down their records and

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reserve my remarks to the jury until after the examination of the defendant's witnesses. I found I could not safely call some of them without opening their evidence to the jury, which I did very briefly; but in the course of their examination the defence broke down, and the defendant yielded to a verdict against him. The right to sum up was never asserted by me or in contest in the cause.

COCKBURN, C. J.—This is on the crown side of the Court, and the practice has been uniform. No such right as that contended for exists, nor did I ever know it either

entered them with the marshal, and the defendant's name stood first, and the prosecutor's lowest in the list, it was held that the trial must be taken according to the order of entry in the marshal's list (*Reg.* v. *Halse*, 1 R. & M. 20). This seems to illustrate a general principle that when a cause, civil or criminal, is removed by certiorari into a superior Court for trial, the procedure at the trial is the procedure of *that* Court. The Court of *Nisi Prius* is as distinct a Court from that of gaol delivery as either of them is from the Queen's Bench.

In the very decision on which it was held "that the 4 & 5 Anne, c. 16, s. 8, does not apply to *criminal causes*," it is implied that they are *causes* (*Anon.* 1 Burr. 252). And the words used in that enactment in actions *brought* in any of Her Majesty's Courts at Westminster, which could not possibly include indictments *removed* into one of those Courts by certiorari.

A similar remark applies to the decisions that the statute 4 Anne, c. 16, allowing double pleading, does not apply to *qui tam* actions, nor "to *actions* at the suit of the *king*" (*Lord* v. *Crowther*, 2 Wils. 21; *Reg.* v. *Caldwell*, Forrest, 57), and the terms used in the latter case rather imply that indictments for misdemeanors are actions, though the word "suit" or "cause" is larger than the word "action." Accordingly, in the words "action or *suit*," it was held that defendant in *audità querela* might plead several pleas (*Giles* v. *Hutt*, 18 L. J., Exch. 53) (not then reported on that point: but it will be seen from the report that there *were* several pleas, and the writer was engaged as pleader in the case). And so as to reference to arbitration, a distinction has been drawn between misdemeanors where there is a remedy of action, and those which are purely public offences: added to which the statutes as to arbitration refer to actions *brought* in the superior Courts at Westminster, and which of course cannot include indictments *removed* there by *certiorari*. See Russell on Arbitration, 15; *The Queen* v. *Hardy*, 19 L. J., Q. B. 196. No more is meant to be conveyed by this note than that the point is one of difficulty and doubt; for which reason the *opinion* of the Chief Baron was reported.

asserted or exercised. Until altered by the legislature, the rules of the Court must be adhered to.

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REGINA v. FIELD.

Verdict.

M. Chambers, Q.C., and *Keane*, for the prosecution.

Lush, Q.C., and *Ballantine*, Serjt., for the defendant.

Coram Hill, J.

INKOP *v.* MORCHURCH AND ANOTHER.

Trinity Term.

REPLEVIN. Averring that the plaintiff being tenant to the defendant, and rent being in arrear, fraudulently and clandestinely removed his goods to avoid payment of rent, and that within thirty days the defendant followed and seized the same as a distress for such rent.

It is for the landlord, who has distrained on goods removed from the premises, to show that they were removed with an intention to defraud him of his remedy by distress.

Plea: that the plaintiff did not fraudulently or clandestinely remove the goods. Issue.

Gates for the plaintiff.

Inderwick for the defendant.

On the 1st November, 1860, the plaintiff, a musical instrument maker, took a large room of the defendants (in a house which the defendant occupied) for the exhibition of the instruments, at seven guineas a week for the first two months, with an option of a third month from 1st January, at eight guineas a week. On the 31st January there was, as the defendant alleged, 43*l.* 10*s.* due for rent, and on that day he being away at the time, the instruments were removed. He came home, however, in time to see some of them removing, and took no step at the time. He wrote in a few days to the plaintiff, who through their attornies replied, claiming a deduction of 18*l.* 18*s.* for eighteen weeks, during which, as they alleged, the room was unfit for occupation. There was a dispute as to this, and sub-

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sequently within the thirty days the defendants distrained upon some of the instruments. The value of the instruments removed was 2,000*l.* There was no other evidence than this to show the removal to have been fraudulent.

HILL, J. (to the jury).—It is for the landlord to give evidence in such a case, leading to the conclusion that the goods were removed with the fraudulent intention of defeating the landlord's right to distrain. It is for you to consider whether the plaintiff in this case removed the goods honestly in the exercise of his right, or fraudulently, with an intention to defeat the landlord's claim for rent. But as to damage, you must consider the rent due.

Verdict for the plaintiff 2*l.* (*a*).

(*a*) Gates moved but took nothing; the Court being of opinion (Cockburn, C. J., Wightman, J. and Blackburn, J.) that the direction was right, and that there was no evidence of a fraudulent intent in the removal of the goods.

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London Sittings, Hilary Term.

Court of Common Pleas, Guildhall, coram Cockburn, C. J.

HIBBERT *v.* OWEN AND ANOTHER.

A memorandum in a printed form of charter-party between two brokers, used by the charterer, "commission to be paid to charterer, to whom the vessel is to be addressed, on her return to London," the charter being only for an *outward* voyage, and making no mention of a *homeward* voyage; and the ship not having returned direct from the port of discharge, but taken a cargo elsewhere:—*Held*, to require evidence that the memorandum was understood by the parties to be part of the contract, and that in mercantile usage it applied in such a case to the return cargo, and meant that the charterer should collect the freight and receive commission on it.

ACTION by charterer against shipowner. Declaration stated that the defendant's ship should load and go to a safe port in Australia, to be consigned to the plaintiff's agents at the port of discharge, and that a commission of five per cent. on the charter was to be paid to the plaintiff, *to whom the ship was to be addressed,* on her return to London.

Averment, that the ship was loaded and went to a safe port in Australia, and thence returned to London.

General averment. Breach, that the ship was not addressed to the plaintiff on her return to London, whereby he lost the fees and commission, and other profits, and advantages to which he would have been entitled if the ship had been addressed to him. Counts for work and commission and fees, and for money received to the use of the plaintiff. Under the common counts the particulars claimed 162*l.* 10*s.* for brokerage on inward freight, and 5*l.* 5*s.* more for charges, making 167*l.* 15*s.*

Pleas: 1. That it was not agreed as alleged.

2. That the said ship did not return from a port in Australia as alleged.

3. Never indebted.

4. Payment.

Wilde and *Honyman* for the plaintiff.

Bovill and *Cleasby* for the defendants.

The plaintiff and the defendants were shipbrokers in London.

On the 13th December, 1856, the plaintiff agreed with the defendants to charter the ship by a charter in the usual printed form used by the plaintiff, with his name printed upon it in the usual way; and in the margin was a printed clause in these terms:—

"A commission of five per cent. on this charter to be paid to Hibbert and Co., to whom the vessel is (to be) addressed on her return to London."

In the body of the charter was this clause:—"The vessel is to be consigned to charterer's agents at the port of discharge."

The charter was for the outward voyage only, for a lump sum of 2,700*l.* The parties had agreed to divide the commission, the defendants to have three-fifths of it.

The ship was duly loaded and the stipulated freight duly

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paid. She sailed from London to Port Phillip, and having there discharged, sailed to Callao, and there loaded a cargo of guano wherewith she sailed to Falmouth for orders, and was ultimately ordered to discharge in London.

It appeared to have been known to the plaintiff before and at the time of the charter, that the defendants intended to send the ship to Callao or some port for a homeward cargo.

When the plaintiff saw that the ship had arrived at Falmouth, he saw one of the defendants, and as the plaintiff stated, was assured that the charter would be carried out by the ship's crews addressed to him if she came to London. A few days afterwards the plaintiff was told by one of the defendants that the ship *was* coming to London, and thereupon, as he stated, said to him, "Of course you will give the captain directions to bring his papers to me, so that we can enter the ship inwards, as per charter-party?" To which the defendant replied, "Of course *not*, we are brokers ourselves; and we can act ourselves; I don't remember that it is in the charter, but if it is, we will pay you the usual reporting fee."

Thereupon, on the 1st April, 1858, the plaintiff addressed to the captain a letter in these terms:—

"In accordance with the terms of your charter-party we have to request that you will, as early as possible, forward to us the news and any papers for entering your vessel and transacting the usual business of the ship." And likewise wrote to the defendants thus:—

"We give you notice that we shall expect the terms of the charter-party to be adhered to, and request that you will direct the captain to bring the papers necessary for the transaction of the ship's business on to this office, on his making his appearance in London. The defendants, however, reported and cleared the ship themselves; and the plaintiff sent to the captain and the defendants a claim to the same effect and amount, as in his present particulars of demand; estimating the value of the

homeward freight at 6,500*l.* at two and a half per cent., 167*l.* 15*s.*

The case for the plaintiff was, that the clause indorsed on the margin of the charter meant that the charterer should not only *report* the ship, but do the ordinary business of the homeward cargo, *i. e.*, make out the freight notes and collect the freight; and that for doing this he was entitled, in the absence of any stipulation to the contrary, to brokerage, or "address commission," at the rate of two and a half per cent. on the amount of the freight.

On the part of the defendants, it was denied that this was the meaning of the memorandum; or that, even if it were so, it applied in the present case, the ship not having in fact returned from the port in Australia, but from a port in another country.

The cause was originally tried before CROWDER, J., when the plaintiff called witnesses to show that the memorandum was usual, and how he ascribed to it; and the defendant called witnesses to show that it was not acted upon when *a return voyage was not mentioned in the charter*, and the learned Judge left it to the jury whether it was part of the contract; and, if so, what were the damages. They found for the plaintiff, damages 151*l.* But this verdict was set aside on a rule, the grounds of which were, that the memorandum was no part of the contract; or that it was not applicable, the charter being only for an outward voyage; or that, if applicable, the plaintiff would only be entitled to commission on 2,700*l.* (the amount to be paid by the charter for the outward voyage); that evidence to alter or explain the memorandum was not admissible, that the clause as to division of commission applied to the homeward cargo, and that the verdict was against the evidence.

The rule was to enter the verdict for the defendant, or a nonsuit, or to reduce the damages, or for a new trial; and the Court made it absolute for a new trial on the ground that there was not sufficient evidence to

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show that the memorandum was part of the contract between the parties. Such evidence, therefore, was deemed not only admissible but *essential*. On the present occasion the plaintiff stated that he had chartered in this case as principal, and that the defendant knew him as such, and that at the time of the charter he had heard from them that they were going to "fix" the ship for a homeward cargo from Callao. That the terms were matter of discussion at the time. That the defendants asked for a division of commission, but that the plaintiff said he must insist on all the terms and clauses of his printed charter intact, but ultimatety he gave way, so far as to allow the defendants three-fifths of the commission on the *outward* cargo, but not for the *homeward*.

On cross-examination the plaintiff stated that he never chartered for others, but that most brokers had a clause of this kind either in the margin or in the charter. He admitted that, in the course of the discussions on the charter, nothing was *said* about "address commission;" but also said that when not intended to be applied to the homeward cargo it was struck out.

There were witnesses called for the plaintiff, who stated that the vessel being "addressed" meant that it should be consigned to a certain party, who should transact all the business and collect the freight, for which he would be entitled to charge, by way of commission, on the gross freight. That the clause was common in the Australian trade, and that in that trade it was common for ships chartered to Australia to return with guano from Callao. That the clause was common, and that it was common to have the ship addressed to a particular firm of brokers. And that, when the clause was retained, they had never known the payment of two and a half per cent. commission on the homeward cargo to the broker, to whom the ship was addressed, objected to.

In the course of the case, the jury intimated that they

were clear that the memorandum was meant to be, and was part of, the contract between the parties.

That point was not, therefore, further controverted, and the case then turned upon the *meaning* of the memorandum, as to which

Bovill called witnesses to show that, according to usage, the word "addressed" merely meant that the broker should have a reporting fee, not collect the freight; but some of them admitted that when the clause was retained, they had collected the freight, and that, if a ship was addressed to them, they should expect to collect the freight. And they admitted that the effect of the clause had been *disputed.*

COCKBURN, C. J. (to the jury).—The question is as to the meaning of the memorandum in mercantile usage. Even if the defendants are correct in contending that it merely means that the ship shall be reported by the broker to whom she is addressed, as nothing has been paid or tendered, there has been a breach of contract, unless, by mercantile usage, the clause becomes inoperative as soon as a homeward charter is obtained.

It has not been disputed that the clause would have applied had not the defendants happened to be owners who desired to collect their own freight.

It is clear that the memorandum has been deemed of importance; for it is admitted that it has been combated and disputed, and sometimes struck out. This shows that it must have *some* meaning and operation. And the question is, *what* effect it has.

To find for the plaintiff, you must be satisfied that its definite and known meaning is what he contends it is. If you think it was so understood, find for the plaintiff. If you are not satisfied of that, find for the defendants.

There is *some* evidence that it does not apply to a homeward voyage.

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And if you think that this is the true view of it, and that the defendants allowed the clause to remain, either from not being alive to its importance or not giving it sufficient attention, find for them.

Then, as to damages, if you think the plaintiff entitled to commission on the freight, say what amount.

Verdict for the plaintiff, 72*l.* 15*s.* for commission, and 5*l.* 5*s.* for reporting = 78*l.* (*a*).

(*a*) This verdict stood: and thus settled a question of some importance, and constant recurrence, which had long been disputed, but never before *litigated*.

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London Sittings.

Coram Erle, C. J.

TURNBULL *v.* BIRD.

The plaintiff, a Roman Catholic, having been appointed Calendarer of Foreign State Papers, the defendant, Secretary of the Protestant Alliance, in the course of a newspaper controversy, on the subject of the propriety of the appointment, published letters, in which

LIBEL. The first count stated that the plaintiff was calendarer of foreign state papers, and was employed in the Rolls' Office, Record Office, and Foreign State Paper Office, as such calendarer, the same being an office of great trust and profit, and, in the discharge of his duties as such calendarer, he sat in a separate room in which, when he was so engaged, there was often a fire, and from time to time, as he sat in such room, certain foreign state papers &c. were placed in his hands, and within his exclusive control, in relation to his employment as such calendarer. And the defendant falsely and maliciously published of

(with certain misstatements of facts not shown to have been *wilful*)—he argued that the papers might not be fairly epitomised by the plaintiff, and also threw out that such papers might not be in safe custody while in the hands of persons of the plaintiff's views, and that such persons might possibly through religious prejudices be induced to mutilate, alter, or abstract them:—*Held*, that (assuming this to be aimed at the plaintiff) if the defendant really *believed* it, the publications were privileged, provided there was no wilful misstatement, but that it was for the jury whether he really could have believed it.

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and concerning the plaintiff as such calendarer, setting out a letter, written by the defendant, Secretary of the Protestant Alliance, to the *Daily News*, January 19, 1861, containing the following passages:—"The ground on which the Protestant Alliance object to the employment of Mr. Turnbull to collate papers relating to the period of religious antagonism of the highest importance, was based upon the antecedents of Mr. T. and his remarkably strong and natural bias to the Jesuits, and his equally intense hatred to the Protestants. In proof of this statement I quote the following from our memorial, every word of which I am prepared to prove, as I made the extracts myself from Mr. T.'s works: 'That Mr. Turnbull is not only a Roman Catholic, but an avowed defender and admirer of the Jesuits, for whom he expresses a natural bias, and holds them in the highest veneration, honour, and esteem; and has in that work manifested this natural bias, calling the Jesuit priest Garnet, who was implicated in the Gunpowder Plot, a well-known martyr, and the conspiracy of Babington against the life of Elizabeth and the State of England, a 'gallant confederacy.' That in another work he designated the Reformation a mischievous event; and has declared that he would rather be condemned with a Papist than saved with a Puritan.' The validity of our objections will, I apprehend, be admitted by most persons, after reading the foregoing extract. But when the deputation waited on Lord Palmerston, his lordship received a letter from Sir John Romilly, justifying the appointment, in which he stated that he (Sir J. Romilly) had appointed Protestant gentlemen since the agitation on the subject, to examine and compare the papers prepared by Mr. Turnbull, and to see that he had done his work fairly; and also another gentleman was appointed to examine the state of the original documents, on their being given to Mr. T., and on their being returned by him, to examine and see

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that they were whole and unmutilated, and to certify to that effect. I write from memory, but I know that I have given the true effect of the letter. If Mr. Turnbull is perfectly qualified for his office, and his integrity be unimpeachable, what need of three gentlemen to watch him, and to put the country to the expense of employing four persons to do the work of one. The Protestant Alliance has not thrown out insinuations against the honesty and capability of Mr. Turnbull; but they put forth clear proofs that he is not, from his peculiar opinions, a fit and proper person for such an office," &c.

Meaning that the plaintiff was such a bigoted and prejudiced Roman Catholic, and had such an intense hatred of Protestants, and a strong bias towards Jesuits, that, by reason thereof, he could not be trusted with the said State papers, that his integrity was impeachable, and that he would mutilate and deface, alter, or destroy, or was capable of so acting, or likely to so act, and that Sir J. Romilly had considered it necessary to watch him, in order to prevent his so doing.

The second count set forth another letter from the defendant to the same paper, stating that the Foreign State Papers contained many *relating* to the history of the Reformation, or events connected therewith: and "that such papers are of the highest importance, and *ought not to be placed in jeopardy. Their custody ought to be perfectly safe.* The Protestant Alliance, and those who signed the memorial, entertain upon good grounds *grave doubts as to their security*, as the following facts will show. On the presentation of the memorial a gentleman of the highest station stated, that when he spoke to a person of distinguished literary merits on the appointment of Mr. Turnbull, he thought at first that there was no danger to our national records: but, on making careful examination into the matter, he expressed himself satisfied *that there was real ground for apprehension.* Still further to show the

danger to our records, in Mendham's *Literary History* it is stated that, from a work in the Bodleian Library (Gesner's *Bibliotheca*), pages containing an account of Luther and others, with their works, have been cut away, and the lower part of the last of these pages so dexterously united, that the very catch word answers, and only the thickness of the pasted portion betrays the abstraction. The articles of Philip Melancthon, Martin Bucer, and Theodore Beza, are completely erased: although Zwinglius is untouched—was not that mutilation the work of some zealous followers of the Jesuits?" (*a*)

Again, the Rev. A. Russell, in his Life of Bishop Andrewes, published in 1860, states that he had searched the State Paper Office for his materials, and had discovered that many important documents are not now to be found; and adds, "It is remarkable, that precisely those papers which constituted the important evidence against Garnet and the other Jesuits are missing (*b*); so that if the merits

(*a*) *Sed quære.* It would depend on the *nature* of the passages extracted. The reporter has not the means of referring to Gesner's work, nor was there any evidence about it given at the trial, though the extract from Mendham's "Literary History" was put in and commented on upon the part of the defendant. To make it of any avail, however, in support of his case, surely the nature of the passages suppressed should have been shown; for it must be well known that Luther at various times uttered opinions which are eagerly laid hold of by Romanists to his prejudice, and which his own admirers would be anxious to suppress. Numerous instances may be seen in the Appendix to Michelet's Life of Luther. So of Bucer or Melancthon; and all of them expressed opinions opposed to those of Zwinglius. These opinions Romanists would certainly not desire to *suppress*, but quite the reverse. The defendant's adoption, then, of the above extract, was hardly a proof of fairness, though relied on for that purpose.

(*b*) The only papers which can be said in any sense to constitute important evidence against Garnet and the Jesuits, are the so-called "examinations or confessions," which formed the usual style of evidence in the trials for treason in those times (*vide* Hallam's Const. Hist. vol. 1, p. 231), and which are printed in Jardine's Criminal Trials (vol. ii. p. 275);

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of the controversy respecting their criminal implication in the Gunpowder plot, had depended upon the fair effect of the original documents now to be found in the State Paper Office, impartial readers might probably hesitate to form a decided opinion against them. It is a singular accident, that among so large a mass of documents, precisely those should be abstracted upon whose authenticity the question so hotly disputed between Catholics and Protestants mainly depended." It is indeed a singular accident that such papers should be abstracted; and probably a similar accident happened to the papers in the eventful reign of Queen Mary, so that the name of that archslayer of Protestants, Bishop Bonner, is not to be found among them (*a*). Probably some one of those worthy Jesuits whom Mr. Turnbull holds in such honour, esteem, and veneration, accidentally *burnt them, especially if he had a separate room and a large fire* (*b*). Even Sir J. Romilly has a hand list kept

some from the Harleian MSS. in the British Museum, and others from the State Paper Office.

(*a*) The only documents in which his name would be found in connection with those events, are the commissions issued to him, in common with other persons, clerical and lay, from the Queen's Council, directing them to execute the laws. See Maitland's Hist. of the Ref. See also the learned work of Mr. Foss, "*Lives of the Judges*," in which there is frequent mention made of these commissions: which were issued not merely to prelates but laymen, and obeyed by the latter with just as much zeal as the former: and were *issued* by a council composed almost entirely of laymen, and comprising many of those who were in office under Edward, and in office or in favour under Elizabeth, and unscrupulous men who cared for *neither* religion and professed either. See the Lives of Cholmley, Rich, Paulet, &c. Mr. Hallam says, "The *Privy Council* were continually urging the bishops forward in this persecution, though the latter bore the chief blame" (Const. Hist. Eng. vol. 1, p. 105). Hence it is clear that any one of the plaintiff's opinions could only desire to *preserve* the official documents relative to this painful subject.

(*b*) The inuendoes under the C. L. P. Act, 1852, are for the jury, under not guilty. (*Baboneau* v. *Farrell*, 24 L. J., C. P. 9; *Rawlings* v. *Norbury*, 1 Fost. & Fin. Nisi Prius Reports, 341.) And it would be for the jury whether the language used meant more than that persons of the

of all the documents given out to Mr. Turnbull, on whom he places such implicit confidence. But after these facts, what becomes of the vigilant system adopted at the Record Office, &c.? Meaning thereby, that the papers which came to the hands of the plaintiff as such calendarer were not safe but in danger and jeopardy, and likely to be mutilated and destroyed by the plaintiff, and that he was such a false, treacherous, and untrustworthy Jesuit in spirit, as described by the defendant, that he was capable of cutting and tearing and making away with such papers, &c.

Plea: not guilty (*a*).

Karslake, *Prideaux*, and *Folkard*, for the plaintiff.

Bovill, *Lush*, and *White*, for the defendant.

The plaintiff and defendant were both barristers and gentlemen of literary character and pursuits, personally unknown to each other, save so far as they became acquainted by means of the subject which brought them into controversy.

The plaintiff was a Roman Catholic, whose past works breathed a spirit of zeal and admiration for the Jesuits.

The defendant was Secretary of the Protestant Alliance.

In September, 1859, Sir J. Romilly, the Master of the Rolls, in his capacity as chief of the Public Record Department, recommended to the Treasury the plaintiff as calendarer of the foreign papers in the State Paper Office, belonging to the period from the Reformation to the Revolution, and the plaintiff was appointed to the office; the

plaintiff's views might possibly, in some cases, destroy or mutilate the documents; and whether this was suggested not as insinuating that the plaintiff would be likely to do so, but as an illustration of the general argument that it was improper to entrust such persons with such documents; and the reporter has reason to believe that the jury's verdict went partly upon this view.

(*a*) There were special pleas, justifying portions of the libels; but demurred to as not justifying the main *gravamen*. As to the inuendoes, *vide* p. 512, n. (*b*).

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duties of which lay in making an abstract of the different documents which were delivered to him for that purpose.

In May, 1860, the defendant, as Secretary of the Protestant Alliance, circulated a memorial to the Prime Minister against this appointment, which received numerous signatures, and which is cited in the first libel.

In July, 1860, a deputation waited on the Prime Minister to enforce the memorial, when he read a letter from Sir J. Romilly, vindicatin the nomination of the plaintiff. The defendant was present with this deputation and heard the letter read, which was the letter he alluded to in the letter of his, now complained of as the libel in the first count; and of which he stated from recollection, that the purport was, that the Master of the Rolls had appointed two Protestant gentlemen to examine and compare the papers prepared by the plaintiff, to show that he had done his work fairly; and that another gentleman was appointed to examine the state of the original documents, &c.

The passages in the letter of the Master of the Rolls to which the defendant had thus referred were as follows:—

"So far as I am acquainted with the documents they held out no temptation to make a false calendar, they consist principally of letters to and from ambassadors in foreign Courts, and deal little with religion. The documents which relate to religion are *domestic* papers which are confided to other gentlemen."

* * * * * *

"However, since the matter has been agitated, I have requested two very competent Protestants, members of the Record Department, to inspect the papers intended to be calendared by Mr. Turnbull, and to make a report to me upon them; and if I find that any of them have a religious tendency, I will take care, that every calendar of these papers shall be tested with the original documents by a gentleman without any Roman Catholic tendencies."

After the deputation, at which the letter was read in the

defendant's presence, the Alliance, and the defendant as their secretary, continued to urge, through various channels, the necessity of a removal of the plaintiff from his office.

In the month of January, 1861, the Alliance published in the *Daily News* and other papers their annual address, making allusion to the appointment of the plaintiff, and their exertions against it as obnoxious.

On the 16th January, the plaintiff addressed to the *Daily News* a letter to the effect that "as the Alliance had thrown out insinuations against his honesty and capability as a calendarer of State papers, he requested them to send some persons to examine his work with the documents themselves."

In answer to this, on the 19th January, the defendant published in the *Daily News* the letter which contained the libel complained of in the *first* count.

On the 22nd January the plaintiff published in the same paper an answer, in which he charged the defendant with a misstatement of the letter of the Master of the Rolls. It turned out that the defendant's recollection of the letter, which he had only *heard read*, was inaccurate; and that what the Master of the Rolls had really written was to the effect, that, in consequence of the outcry made against the plaintiff's appointment, he had desired two Protestant gentlemen to see how the work had been done. There was no reason to suppose that the defendant had in this respect made a wilful misstatement, and he denied it upon his oath.

The plaintiff however, in replying to this first letter of the defendant in the same newspaper, charged the defendant with stating as "a *positive fact* of *his own knowledge*," that three gentlemen were set to watch him, &c., whereas, it will be observed, the defendant, so far from stating it as of his own knowledge, professed to quote a letter of the Master of the Rolls, and to quote it only from memory. The plaintiff in his reply went on thus:—"I challenge him

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to prove that statement. I charge him, in making it, of being guilty of deliberate falsehood," and then went on to accuse the defendant of various misstatements.

The defendant replied by a letter of January 22nd, in which he retorted these accusations, and pointed out what he deemed inaccuracies in the plaintiff's statements, showing his unfitness for the office of analysing and epitomising documents.

On the 24th January the defendant published (in answer to a letter of the Rev. Mr. Brewer, in defence of the plaintiff, which stated that "a hand list was kept of all documents given out to the plaintiff, so that any loss or mutilation would be instantly detected,") another letter, containing the libel complained of in the *second* count, and the passage chiefly complained of, alluding to documents as being burnt, "especially if he had a separate room and a large fire."

On the 28th January, four days after that letter, the plaintiff resigned his appointment.

On the 29th January the resignation was accepted, and in February this action was brought.

The plaintiff being examined as to the nature of his duties, stated that they related entirely to Foreign State Papers, the *domestic* series having been entrusted to other persons, and nearly completed; and that they related only indirectly, casually, and collaterally to the events of the Reformation, and rather to its *political* than its *religious* aspects (*a*).

He performed his duties in the office, at which were engaged Mr. Hardy and Mr. Brewer, and in a separate room, which in winter had a fire; Mr. Brewer being engaged in the adjoining room.

No restrictions were imposed on him which were not

(*a*) This seems *in substance* what the defendant had stated in the libels complained of; though other publications of his were alleged to have misstated this part of the matter.

also imposed on the other persons engaged in like duties (*a*).

The plaintiff stated, that had the controversy related only to his fitness or competence for the office on general grounds, he should not have resigned; but that when he found it imputed to him that he was capable of acting in a felonious manner, by abstracting or mutilating documents entrusted to him, he felt it necessary to throw up his appointment.

The plaintiff said he had not seen the letter of the Master of the Rolls.

Having stated that he had instructed a member of parliament to bring forward his case in parliament, and seen the reports of the discussions, he was, on cross-examination, asked divers questions upon statements reported as made by that member on the matter.

The Rev. Mr. Brewer and Mr. Hardy were called on the part of the plaintiff, and confirmed his evidence as to the nature of his duties, and stated that the rules applicable to the use of the papers, &c. were applied alike to all persons engaged upon them, and that there were none specially applied to the plaintiff.

They stated that, in their opinion, there were no documents of a controversial character among those with which the plaintiff had to deal, and that he had done his duties faithfully and fairly.

Mr. Hardy stated that, on the 14th of February (some weeks after the libels complained of and about a week before action), the defendant called upon him at the office for the first time, and desired to borrow the volume which the plaintiff had recently published, and which he did not appear to have seen. The defendant on that occasion, however, stated that he had no complaint to make of the

(*a*) This was with reference to the statement by the defendant from recollection of the Master of the Rolls' letter, as to the precautions supposed to be taken against the plaintiff. But this was not a *wilful* misstatement. *Vide supra*, p. 516, n. (*a*).

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way in which the plaintiff *had done* the work, but objected to him on general grounds, on account of the strong opinions he had avowed as to his admiration for the Jesuits and the like. Being asked as to a certain statement put forth by Lord Shaftesbury as to the plaintiff being employed to deal with documents relating to the Reformation, and to write the history of the Reformation, he declared that he had never asserted so much, and that a statement to that effect in one of the recent reports of the Protestant Alliance was an oversight (*a*). The witness explained to him the nature of the papers with which the plaintiff had to deal, and of his duties in regard thereto.

Divers passages from the plaintiff's published works were cited and commented on; and, on the other hand, passages from well-known writers, such as Mackintosh, were cited in support of the opinions he had expressed, in *favour* of the Jesuits and the like, to show that candid and learned Protestants had not hesitated to put forward similar sentiments. On the part of the defendant, an extract from Hobart's "*Mornings with the Jesuits*" was tendered, but objected to on the part of the plaintiff, as not partaking of the character of a work of history, so as to entitle the defendant to read it. The objection, however, was not pressed, as there had been some latitude allowed on either side (*b*).

(*a*) The defendant's evidence *confirmed* this. And the letters complained of seem to state the matter in this respect with substantial fairness. *Vide supra.*

(*b*) *Semble*, however, that the extract from the last-mentioned work was not admissible within the principle of the law of evidence on this most delicate and important point, as elucidated and laid down either in Mr. Best's most learned work, or in the latest case on the subject, a case similar in many respects to the present; and in which the subject is well gone into, *Darby* v. *Ouseley*, 25 L. J., Exch. 227. The distinction is manifest between works assuming to be written with the gravity and impartiality which belongs to history, and works of a polemical or partisan nature. And whether a work is of one character or the other, is clearly a collateral matter of fact for the Judge to decide.

The plaintiff was cross-examined in support of the statement of the defendant in his first letter, that the foreign papers he was employed to abstract contained documents received from foreign parts during the period in which occurred the important religious struggles on the continent and the "treasonable attempts and plans of the Jesuits against the life of Queen Elizabeth and the safety of the realm of England," and that he approved of these attempts. He avowed his admiration of the Jesuits, but declared his disbelief in these attempts as against her life, and attributed the supposed plots rather to the schemes set on foot by crafty statesmen to ruin the Catholics (*a*).

Bovill, on behalf of the defendant, put in and relied on the extracts cited by the defendant in the libels complained of, as historical works, confirming the view he had taken as to the danger of loss or injury to the documents. And he also cited a passage from Jardine's "Criminal Trials" (*b*)

(*a*) Probably alluding to the disclosures in such cases as that of Parry; of whom Mr. Jardine says (Criminal Trials, vol. 1, p. 249) "from his correspondence when abroad, it is manifest that his occupation was the basest and most odious espionage," &c.; and that "the statements of so base a wretch can hardly be entitled to much credit" (Ibid. p. 276). It was upon the statements of this man that the charges against the Jesuits were first brought forward; and as regards plots for assassinations, they were always *denied* by persons of the plaintiff's opinions.

(*b*) This passage is as follows: and other passages from the same work are added: whence it will be seen how far it confirms or refutes the view taken by the defendant.

Mr. Jardine states in his Criminal Trials, "The most satisfactory means of enlarging the report of Garnet's trial have been derived from the documents in the State Paper Office. Most of the original letters, confessions, and examinations relating to the subject, are still to be found in that depository: and many of these, the originals of which are lost, are so fully abstracted in the various contemporary works in which Garnet's connection with the plot has been discussed, that their substance may be readily ascertained * * *. It may be asserted with confidence that there is *little of the material evidence against Garnet which is not now accessible* to those who may have sufficient curiosity and patience to pursue the enquiry." (Jardine's Criminal Trials, vol. 2, p. 236.) The same learned writer states that "Garnet's

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for a similar purpose, and to show *bona fides* on the defendant.

connection with the plot forms an historical problem of *very difficult solution.*" (Ibid. p. 196.) There was here therefore a material misstatement, but it was not proved to have been so at the time: doubtless it was not wilful. Thus Mr. Jardine observes in his comments on the papers used at Garnet's trial: "but the above papers are *still in existence at the State Paper Office* in Garnet's handwriting; and no doubt can exist as to their genuineness. They contain nothing inconsistent with Garnet's statements on the trial: taken by themselves, indeed, *they rather strengthen his defence*"[a] (p. 323). In Mr. Jardine's comments on what he calls the "iniquitous" use made, at the trial, of one of Garnet's examinations, he says, "as *appears from the original in the State Paper Office*, it was garbled, so as to amount to a forgery of evidence against him"(pp. 356—358). How could the plaintiff, or any admirer of the Jesuits, wish to suppress such papers?

Then again, Mr. Jardine, in a note to the paper of Tresham's confession, upon the words "I told your lordship *to avoid ill usage*," observes, "This paper is taken from the original at the State Paper Office. The passage in italics is in the original marked for omission in reading it at the trial, in order that it might not appear to the public that any threats or force had been used to Tresham" (p. 307). It is manifest that no one of the plaintiff's opinions would wish to suppress these documents; as they would afford him the most powerful arguments, which similar observation applies to *all* the State papers relating to the events of those days, especially relating to State trials; for the same learned writer points out that the only evidence used was the confessions or examinations of the accused—usually wrung from them by torture: and the *originals* of which, upon the face of them, often suggest the unfair means which has been employed to extort them, or the unfair use made of them. No one of the plaintiff's opinions could desire to get rid of them, but rather to *preserve* them.

Other illustrations will be found in Mr. Jardine's comments on the trial of the conspirators for the Powder Plot; in which he shows that the narrative published by the government is of no historical authority, and shows this by the interlineations and alterations *observable upon the originals* (Criminal Trials, vol. 2, p. 5). "A few instances of this dishonesty," he says, "deserve to be noted. The declaration of Fawkes was published artfully without a date, but the date appears from the original;" and then he shows an interpolation made in the pretended copy: so in several other instances." So another instance occurs in the confession of Thomas Winter. "The original is lost, but in a contemporaneous copy of it in the State Paper Office, there is a marginal remark in the handwriting of the king, designating in a particular passage what he

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Bovill, on the part of the defendant, denied that the fair meaning of the passage especially complained of in the libel was, that the plaintiff would burn or destroy, or mutilate the documents, but contended that it was only an incidental historical illustration of a general argument, as to the danger of entrusting such documents to persons of strong views. And the case for the defendant in substance was, that the matter was one of public interest, in which, in a newspaper controversy, which the plaintiff himself had begun, the defendant had a right to express his opinion; that there was no actual or personal malice, and that the alleged libels, if defamatory, were privileged.

In support of this defence the defendant was called, and stated that his attention had first been called to the subject by a letter in the *Athenæum* of September, 1859, before which time he had not been acquainted with the plaintiff. In consequence of that article he laid the matter before the Protestant Alliance, and a memorial was resolved upon and prepared and presented under his auspices as already stated, the usual means being taken to procure signatures, by circulation of papers and the like.

He explained as oversights the misstatements as to the nature of the plaintiff's duties, and as to the purport of the Master of the Rolls' letter.

He disclaimed all personal ill-will or desire to injure the plaintiff, and declared his only object was to discuss what he deemed a question of public interest.

calls an 'uncleare phrase.' This obscurity is accordingly removed by an interlineation, and the document is published in the narrative in its altered and improved shape. Many other instances of interpolation, and still more of the suppression of facts, in the narrative, might be pointed out: the above are sufficient to show that it ought not to be depended upon as a source of history" (Ibid. 7). This is not a conclusion which any one of the plaintiff's opinions would desire to dispute, but rather to uphold, and it is, it will be seen, founded upon the *original documents:* which, it was suggested by the defendant, he would desire to suppress. The inference was, that the plaintiff *disbelieved* in the plot; not that he *approved* of it.

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Nor was there any evidence of personal malice towards the plaintiff, except so far as it might be inferred from the tone of the *second* letter, written *after* the imputation of "deliberate falsehood," that there was some natural irritation on that score.

It was admitted that the plaintiff was a gentleman of honour and high character, and incapable of destroying, mutilating, or purloining documents with which he was entrusted. But it was contended that it was a fit and fair subject for public discussion, how far he might be liable to temptation so to act, considering his polemical antecedents, and the strong feelings he had betrayed in former writings.

Bovill, in order to support his case and show *bona fides* on the defendant, tendered articles in newspapers, seen by the parties, against the plaintiff's appointment.

ERLE, C. J., said, the question is, whether the occasion was one which would justify the publication of defamatory matter, which must depend upon the circumstances under which the publication was made, not upon the opinions about those matters which may have been expressed at the time. It is for the jury to determine as to the absence or presence of malice in the defendant, and I am of opinion that it is entirely irrelevant to consider what was published on the subject at the same time.

Bovill.—These articles are not offered as matters of opinion, but as matters of fact; to show that there was, to the knowledge of both parties, a public discussion on the subject.

ERLE, C. J.—That no doubt will be admitted, and may be taken as an established and notorious fact.

The defendant, in the course of his evidence, put in the "Constitutions of the Jesuits," and referred to a passage, the purport of which is, that the rules are not *obligare ad peccatum*, not to bind under (*i. e.*, under pain of)

sin, unless by the express command of a superior; and he stated that the meaning was, that the command of the superior would bind, even though it were to commit sin.

ERLE, C. J., pointed out that this was a construction, not consistent with the whole character of the constitutions; and suggested that it could scarcely be correct.

There was no evidence that any persons of the opinions of the plaintiff *had*, in point of fact, ever destroyed or mutilated public documents of historical importance; the instances mentioned in the historical works cited, not being proved to have attached to persons of such opinions (*a*). And it was proved on the part of the plaintiff, that no documents had been lost from the office while he was there.

ERLE, C. J. (to the jury).—The case has taken up a great deal of time; *but not more than proportioned to its importance.*

The plaintiff complains of libels suggesting that he was capable of mutilating or destroying documents with which he was entrusted, and as it is mentioned that he has in his sitting-room at the office a fire; as if he were likely to throw any of them into it, while he is sitting there alone.

There is no doubt that the matter so complained of is libellous (*b*) and would entitle the plaintiff to your verdict, unless the defendant can establish a defence.

Now, the law is, that defamatory matter is presumed to be malicious, unless it is published in the performance of any duty, legal or moral, or in the exercise of any *right*.

The defence, on the present occasion, comes under the *last* head, as a matter necessary to the protection of the public interests, or the exercise of a public right.

And the law is, that a man may publish defamatory

(*a*) *Vide ante*, p. 511.

(*b*) The Lord Chief Justice here assumed the inuendoes as laid, but they were, of course, ultimately, for the jury. *Vide ante*, p. 512, n. (*b*).

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matter of another, holding any public employment, if it is a matter on which the public have any interest, within the limits I will lay down, in accordance with decided cases.

"Every person has a right to comment on the acts of a public man, which concern him as a subject of the realm, if he do not make his comments the vehicle of malice or slander."

The defendant, in this case, contends that he comes within this rule; that he, as a subject of the realm, having an interest in the Foreign State papers, with which the plaintiff was entrusted, had a right to refer to, and comment on, the plaintiff's employment, and the plaintiff's character in that office.

And I am of opinion that the occasion would justify the comments, provided they can be brought within the limits laid down by the law in this class of cases.

The rule in these cases is, that the comments are justified, provided the defendant *honestly* (*a*) believed that they were fair and just.

With that limitation the law allows the publication.

The word "malice" in law means any corrupt motive, any wrong motive, or any departure from duty (*b*).

And for the purpose of the present trial, I shall lay it down, that if you are of opinion that the defendant, in the comments that he made, was guilty of any wilful misrepresentation of fact, either by the exaggeration of what actually existed, or by the partial *suppression* of what actually existed, so as to give it another colour; or if he made his comments with any misstatement of fact which he must have known to be a misstatement, if he exercised

(*a*) *Quære*, whether this does not include *reasonably*? The word was not used by the Lord Chief Justice, but it seems implied in the whole tenor of his remarks. A bigoted person might *honestly* believe that the plaintiff would burn any document which he might fancy likely to be injurious to his Church.

(*b*) *Vide supra.*

ordinary care (*a*), then he loses his privilege, and the occasion does not justify the publication, which would then be actionable, and the verdict must then be for the plaintiff.

Now the counsel for the plaintiff, in order to show that the defendant did not honestly *believe* his statements to be true, relied on several alleged misstatements or misrepresentations by him of certain matters of fact. And you are to consider whether this has been made out. The misrepresentations thus relied on are, as to the nature of the documents entrusted to the plaintiff, or of his duties in respect thereto, or to the precautions stated to have been taken against him; and, chiefly, as to his being capable of the immoral acts imputed to him, or suggested by the defendant as likely to be committed.

These are all matters for you to consider, on the issue which you have to decide. With regard to the first head, the nature of the plaintiff's duties, and the documents entrusted to him, the defendant admits that in July, 1860, the letter of the Master of the Rolls was read in his presence, and the plaintiff contends that this should have shown the defendant that his alarms were unfounded; and that before he put forth any further publications on the subject he should have gone to the office and made further inquiries. This is for you to consider, with a view to forming a judgment as to the *bona fides* of the charges suggested in the defendant's subsequent letters, which form the libels complained of.

Then, again, you are to consider the antecedents of the plaintiff, as they might have been known to the defendant, and to judge whether, under the circumstances, the continuance of these publications, down to the time of the plaintiff's resignation, was *bonâ fide*. And you are especially to consider whether, it being admitted by the counsel for

(*a*) *Vide ante.* Jardine's "Criminal Trials" is a very popular book, which the defendant might be presumed to know of; but it was not referred to on the part of the plaintiff.

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the defendant that the plaintiff is a man of honour and of high character, the defendant could honestly have believed that he was capable of the acts suggested, as likely to be committed by him. It is for you to judge whether the misstatement was reckless, or made with a want of ordinary care and caution; and whether the comments made on the plaintiff's former writings were fair and just.

The plaintiff has avowed that he admires the Jesuits, and it is suggested that they have inculcated duplicity, mental reservation, and tampering with truth. But, if so, it is not the less true that they have carried out the principles of Christianity with remarkable devotion, and that mankind are indebted to them for labours in science and in literature and religion all over the world. One man has as much a right to declare that he holds them in veneration for what they have done for mankind, as another has to hold them in aversion or in scorn. Some of them may have deserved one character, some of them the other. And if the defendant, in publishing of the plaintiff that he held them in admiration, put it forth as if the plaintiff approved of what was deceitful or "Jesuitical," in the sense in which we use the word, that would not be fair or just, unless he honestly believed that the plaintiff really did approve of deceit and falsehood (*a*). The defendant in his letters alludes to the plaintiff's mention of Garnet the Jesuit as the "martyr." But his guilt has been matter of very grave discussion, among men who have looked into the subject with interest (*b*).

(*a*) "It is most absurd and unjust to argue, because a particular Jesuit, two hundred years ago, followed his pernicious principles into a wicked course of action, that therefore the principles and doctrines of Catholics at the present day must be practically opposed to morality" (Jardine's Criminal Trials, vol. 2, p. 309).

(*b*) "The nature and extent of his connection with the plot, constitutes an *historical problem of extremely difficult solution*" (Ibid. p. 196). And Jardine calls him a "victim."

There are State trials in the times of the Tudors and Stuarts, and in the time of James I., which any man capable of judging of evidence, or the principles of criminal judicature, must read with great pain (*a*); and, in respect of Garnet, there has been great controversy, some maintaining that he was wrongly convicted; and it is manifest that the plaintiff is of that opinion. It is a question open to controversy (*b*). Was it fair towards the plaintiff to say that he was "naturally biassed" in favour of Garnet, "who was implicated in the Gunpowder Plot," as if sanctioning that plot? Then the defendant alluded to the plaintiff's speaking of Babington's conspiracy as a "gallant confederacy" (*c*). But if all which Babington confessed was, joining a band of gentlemen to liberate Mary, Queen of Scots, that might well be called a "gallant confederacy." All these and similar matters are relied on by the defendant, as showing that he had fair grounds for publishing these statements of the plaintiff, and it is for you to say if they do so.

The matters they refer to are open subjects of controversy,

(*a*) "The glaring transgression of natural as well as positive law, which rendered our Courts of Justice in cases of treason little better than *caverns* of murderers." * * * "The want of all evidence except written, perhaps unattested, examinations or confessions" (Hallam's Const. Hist., vol. 1, p. 231).

(*b*) From Mr. Jardine's account of the trial, it appears that the evidence in his case consisted entirely of written examinations, for the most part extorted by torture, or *threat* of torture, or examinations of the accused on his trial (Crim. Trials, vol. 2, p. 356). He adds, that more than usual unfairness took place in the mode of laying the declarations before the jury; and he calls the mode of proceeding "iniquitous," and declares the trial a *peculiar* illustration of the cruelty and injustice of a State trial in those times.

(*c*) It is when alluding to the case of Babington that Hallam speaks of our Courts of Justice in those times as dens of murderers (Const. Hist. vol. 1, p. 231); and Dr. Lingard gives strong ground for suspecting interpolations in the letters ascribed to Babington, in order to sustain the charge of a complicity in a conspiracy to *assassinate* (Hist. Eng. vol. vi. p. 203). As to the supposed confessions, see Mack. Hist. Eng., vol. 3, p. 309.

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and on which opposite opinions may fairly be expressed. But what you have to consider is, whether, after what had come to the knowledge of the defendant, he fairly and honestly, in the exercise of the privilege the law allows, put forth the passages complained of—chiefly that last—in which there is the allusion to the fire, and the suggestion of the danger of papers being destroyed by the plaintiff.

Verdict for the defendant (*a*).

(*a*) It was intended to move for a new trial, but the cause was settled by each party paying his own costs. The reporter has reason to believe that the verdict went upon a doubt as to whether the words mainly relied on by the plaintiff meant that *he* would burn the papers, or that some persons of his opinions might do so. This was clearly for the jury, although the Lord Chief Justice did not deem it necessary formally to leave it to the jury. And the following case seems in some respects to illustrate the present one.

"In case for libel, the declaration stated that the plaintiff was a Roman Catholic priest, and priest of a chapel named, and that the defendant, intending to injure him in his said offices, published of him, in those offices, a libel, which was set out. The alleged libel contained an account of a Roman Catholic having been seen performing a penance, which was suggested to be of a degrading kind, and added that the party performing the penance said that his priest would not administer the sacrament to him till he had performed it, and that his priest was the plaintiff. The declaration also set forth certain comments of the defendant, accompanying the publication, and in which the Roman Catholic discipline was attacked. The libel was not otherwise connected with the plaintiff, nor was there any allegation showing how the enjoining of such a penance would affect the character of a Roman Catholic priest. Judgment was arrested, the Court holding that the publication was not, on the face of it, libellous, and refusing, even upon the assumption that the plaintiff was charged with imposing the penance, to intend that the jury had evidence before them of an injury to the plaintiff which the declaration did not show, though some evidence to that purpose was in fact given. *Hearne* v. *Stowell*, 12 Ad. & E. 719; 4 Per. & D. 690; 6 Jur. 458.

"Held, that, if the publication had been libellous, it would not have been justifiable on the ground that it was promulgated at a public meeting called to petition Parliament against making a grant in support of a Roman Catholic college." *Ib.*

The case is perhaps the first in

which it has been so broadly laid down that any discussion on a question of public interest makes a *bonâ fide* publication privileged; and it has been held not to justify a *report*; *Davison* v. *Duncan*, 7 E. & B. 229. But it should seem that it is to be collected, as the general principle, lying at the basis of all the reported decisions in favour of the privilege of publication, whether in the way of report or criticism. See *Paris* v. *Levy*, *ante*, p. 71 (confirmed in 30 L. J., C. P. 11); and see *per* Willes, J., *Eastwood* v. *Holmes*, 1 Fos. & Fin. p. 347. The words "public interest," as an element of privilege, in criminal prosecutions, in the case of newspapers, were imported by Lord Campbell into his Libel Act, 6 & 7 Vict. c. 96, doubtless not from any mere notion of his own, but as derived from what that great lawyer deemed to be the law on the subject, as applicable to actions.

Coram Erle, C. J.

PRICE *v.* MOUATT.

Trinity Term.

ACTION for wrongful dismissal.

Declaration, that in consideration that the plaintiff would enter into the service of and give the *whole of his services* to the defendant and be subject to his advice and guidance, if necessary, for three years, in the capacity of *buyer* in a certain business of the defendant's at a yearly salary of 500*l.*, payable monthly, the defendant promised the plaintiff to retain him in the said service during the said period, *in the said capacity*, and on the terms aforesaid.

Averment, that the plaintiff entered into the said service in the capacity and on the terms aforesaid, and so continued until the breach, and was always ready to continue in it and give the *whole of his services* to the defendant, and be subject as aforesaid in the capacity aforesaid. Breach, that the defendant wrongfully dismissed the plaintiff from the said service.

Pleas: 1. That the defendant did not promise as alleged.

2. That the plaintiff did not enter into, nor was in, supposed service, in the capacity and on the terms aforesaid.

On a contract in writing, within the statute, in general terms for the employment of the plaintiff:—*Held*, that it might be shown by parol, that he was employed in a particular capacity; and, as a question whether he had *wilfully* disobeyed a *lawful* order, *held*, that it was for the jury whether the order was within the scope of that employment, and whether, even if so, the disobedience was "wilful."

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3. That the plaintiff was not ready and willing as alleged.

4. That the plaintiff misconducted himself in the service, by wilfully disobeying the lawful orders of the defendant by him given to the plaintiff with reference to the said service (*a*), wherefore the defendant dismissed him.

Macaulay and *Needham* for the plaintiff.

Hawkins and *Aspland* for the defendant.

The defendants were warehousemen, and, wanting a lace-buyer, applied to the plaintiff to enter into their service as such, which he agreed to do, the following memorandum being given him: —

"Messrs. Mouatt agree to engage Mr. Price for three years at 500*l.* a year, payable monthly, he to *give the whole of his services,* and to be advised and guided by them, if necessary." 5th August, 1859.

Both parties signed this; which, it will be observed, did not mention the capacity in which he was engaged.

The plaintiff stated that he acted as buyer; and that, as such, it was his duty to purchase and see that the goods were properly sold.

In September, 1859, the partner who engaged him retired, and the others seemed anxious to get rid of him, and proposed his leaving or taking a smaller salary, which he declined.

In December the defendants told him they were not satisfied with his buying, and that in future another party would buy, and that he might go. The plaintiff declined, and claimed to continue in the capacity of *buyer.*

(*a*) *Quære* whether this must be taken to import "in the *said capacity*" (*i. e.* as buyer), and whether, if *not*, the plea was good? If it *did* import that, of course it was disproved, as the order was clearly not to do something as buyer.

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One day, in January, 1861, after this, being at his duty in that capacity, one of the defendants said rudely to him, "Can't you find a job?" The plaintiff replied, civilly, "If you will point out one, I shall be very happy." The defendant said, "Card this lace." "That," said the plaintiff, "is only work fit for boys; I can't do that." The defendant then said, peremptorily, "If you refuse, take your hat and go; leave the premises!" The plaintiff thereupon left.

It was no part of his duty, *as buyer*, to card lace.

He had left a good situation to come to the defendants, and had not since been able to find another; the employment as *buyer* being very good, and not easy to replace.

The action was brought in March, 1861 (*a*). He had not *applied* for employment, but stated that, if a buyer had been wanted, he should have heard of it.

The defendants called no witnesses.

Hawkins objected that the written memorandum did not mention the employment as *buyer*.

The LORD CHIEF JUSTICE overruled the objection. The memorandum was merely to satisfy the Statute.

ERLE, C. J. (to the jury).—The material question is, did the plaintiff wilfully disobey a lawful order? For disobedience may not be wilful, even if of a lawful order.

First, was it a *lawful* order?

Secondly, was the refusal a *wilful* disobedience of the order?

The question is for you. It is obvious that the defendants wanted to get rid of the plaintiff.

As to damage, it clearly cannot be the whole amount, 750*l.*; for the plaintiff was bound to turn his talents to reasonable account. On the other hand, it appears that the employment was one of a peculiar character, not easily

(*a*) *Goodman* v. *Pocock*, 19 L. J., Q. B. 410.

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obtainable, so that the plaintiff might well be a considerable time before he obtained a new place.

Verdict for the plaintiff, 375*l.* (*a*).

(*a*) *Hawkins* moved in M. T., but took nothing; the whole Court being of opinion that the nature of the employment might be shown: and that it was for the jury whether the order was a lawful order within its scope.

Court of Common Pleas, Westminster, coram Byles, J.

HERITAGE *v.* LAWRENCE.

Hilary Term.

On a contract for credit, a promise to pay before the time is *nudum pactum*, but it may be material as to whether the contract *was* for credit.

ACTION for goods sold.

Plea: never indebted.

There had been several deliveries of the goods, and with the first parcel, no invoice appeared to have been sent to the witness, for the plaintiff admitted that something was said about a month's credit.

The purchase was on the 29th September.

The invoice was dated 1st October, and nothing was said in it as to credit.

The action was on the 21st November.

There was a promise to pay proved, on an application for payment.

Kenealey, for the defendant, claimed a nonsuit. The promise would be *nudum pactum*.

BYLES, J.—That is so, no doubt (*a*), assuming that the contract was upon credit: but that is for the jury, on the whole of the evidence.

Verdict for the plaintiff.

Philbrick for the plaintiff.

Kenealey for the defendant.

(*a*) *Hopkins* v. *Logan*, 5 M. & W. 241.

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Court of Common Pleas, Guildhall, coram Willes, J.

HOLMES *v.* WORTHINGTON AND ANOTHER.

Trinity Term.

Where a servant, knowing of a defect in machinery he has to work in his master's employ, complains of it to him, but continues in the use of it, in the reasonable expectation of its being repaired, and an accident happens through its defective condition, he is not precluded from recovering against his master for negligence (*a*).

THE declaration stated that the plaintiff was in the employ of the defendants, and the defendants were possessed of a cellar, and for the purpose of depositing and keeping barrels of ale, and for the purpose of removing and raising such goods from and out of the cellar, they had provided and were possessed of, and used, a machine called a crank and ropes; and the crank and ropes were in a bad, defective, and improper state, and unfit and unsafe to be used, and were dangerous to any person using them, and the defendants had notice and knowledge of that fact and of the premises; and, in the plaintiff's said employment, it became and was his duty to remove and raise, and he was, by the defendants' orders and directions, employed in removing and raising a barrel of ale from and out of the cellar, and for that purpose used the crank and ropes, and did so in a careful and proper manner, and without any notice or knowledge that the same were in the state aforesaid, or unfit or unsafe to be used, and by reason of the premises, and of the crank and ropes being in that state, and so unfit and unsafe, the *ropes broke*, and the barrel fell upon the plaintiff, &c.

Pleas: 1. Not guilty.

2. That the crank and ropes were not in a bad state, &c.

3. That the defendants had not notice and knowledge, &c.

4. That the plaintiff was not by their directions using the same, &c.

5. That the plaintiff did not use the crank and ropes in a careful and proper manner, and without notice or knowledge that the same were dangerous to him in using the same for the said purpose as alleged.

6. That the ropes did not break as alleged.

(*a*) Following *Holmes* v. *Clark*, 30 L. J., Ex. 135.

1861.

HOLMES v. WORTHINGTON and Another.

T. Atkinson and *Inderwick* for the plaintiff.

Phipson (with him *Lush*) for the defendants.

The defendants were brewers and had stores at Birmingham, where there was a crank for the purpose of hoisting barrels from the cellar to the ground floor. They had entered on the premises on the 1st January, 1860. The brewers having previously occupied them, and used the same machinery. There were two ropes used, called the cellar rope and the crank rope, which was worn, and the hook loosened. The plaintiff was defendants' cellarman, and it was his duty to sling the barrels in the ropes, and they were thus hauled up a kind of wooden framework laid on the cellar steps. Having attached the ropes by the hooks, he had nothing further to do, and the barrels were hauled up by a man above, at the top of the steps. Soon after the defendants entered he complained to their manager and to them of the state of the ropes and hooks.

The defendants said that they should be seen to, and a new hook was put on the crank rope, but nothing was done to the other, the cellar rope, and while the plaintiff was using it in raising a barrel, it broke, and the barrel fell upon him.

At the close of the plaintiff's case,

Phipson, for the defendants, claimed a nonsuit: the allegation in the declaration that the plaintiff used the machinery without notice of its state, not only not being proved, but being disproved. The plaintiff cannot recover, according to the decided cases (*a*).

WILLES, J.—There is no case deciding that where the employer and the servant are both aware that the ma-

(*a*) See *Griffits* v. *Gidlow*, 3 H. & N. 654; *Senior* v *Ward*, 1 E. & E. 396; *Roberts* v. *Smith*, 26 L. J., Ex. 319; *Williams* v. *Clough*, 27 L. J., Ex. 325; *Cowley* v. *Mayor of Sunderland*, 30 L. J., Ex. 127; *Ashworth* v. *Stanwix*, 30 L. J., Q. B 183; *Dynen* v. *Leech*, 26 Ibid. 221; *Holmes* v. *Clark*, 30 L. J., Ex. 135.

chinery is in an unsafe state, and the servant goes on using it under a reasonable belief that it will be set right by the employer, and it is *not* set right and he suffers an injury, he cannot sustain an action. The master may choose to be too chary of repairs for the sake of economy. No doubt if, knowing this, the servant chooses to use the machine, he *may* lose his remedy; just as in the case of a man taking employment at a gunpowder factory. But there may be a case in which he relies on the master's getting the repairs done, and I will take the opinion of the jury on the matter, reserving leave to the defendant to move, as the case may turn out.

Phipson then called the foreman or manager, who said the plaintiff had complained of the ropes, and that the defendants had promised that the matter should be looked to, but that the *ropes* did not require repair. It transpired, however, that there had been a new rope ordered immediately after the accident, and the ropemaker being called said the ropes had been changed, because of the accident.

The plaintiff had sworn the defendants were told that the ropes were unsafe, and that they had promised to see to it, and they were not called to contradict this.

WILLES, J. (to the jury).—If the defendants knew of the defect and undertook to repair it, and the plaintiff went on working, relying on their repairing it, then they may be liable. If the plaintiff complained of the defect, and the defendants promised that it should be remedied, he is not to be deprived of his remedy, merely because, relying on their promise, he remained in their employment. You must, however, be satisfied that they were aware of the defect, and that the accident arose from it, and not from plaintiff's want of care.

Verdict for the plaintiff, 100*l.*

Phipson thereupon applied for leave to move for stay of execution, contending that the issue as to notice must be found for the defendants; but

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HOLMES v. WORTHINGTON and Another.

WILLES, J.—It must be read either as alleging that the plaintiff did not use the ropes with proper care, but so carelessly as to contribute to the accident, in which sense it only raises the same defence as arises under the general issue, and must be found for the plaintiff; or, if it is merely a negation that he was ignorant of the defect, and a general averment that he used the ropes carelessly, which would be a bad plea, as such it must be proved *in omnibus*, and the latter part is not proved. Moreover, I am disposed to think that the jury might even find the first part of the plea for the plaintiff, for if knowledge may mean belief on sufficient grounds, as he had his master's assurance that the defect should be remedied, he might well be said to have had no knowledge at the time of the accident that the defect existed. But at all events the allegation as it stands in the declaration is immaterial; and if I am asked to do so, I will strike it out, and you may bring error if you like, but I will not stay execution.

Application refused.

Coram Keating, J.

FARRER *v.* COCK.

Trinity Term.

After amendment and demurrer, before trial, *query*, whether an amendment will be allowed at the trial, so as to get rid of the demurrer, and also to evade a variance arising on the evidence of the party applying to amend.

DECLARATION, that the plaintiff, being a carpenter in the employ of the defendant, a builder, and doing certain work for him in a certain building, had lawfully put and placed on a board, on and across certain joists, (having spaces between them, opening into the lower part of the building,) for the purpose of enabling the plaintiff and the defendant and others to walk upon the same, as it was necessary to do, walking on the joists being unsafe [and it was the plaintiff's intention to walk on the said board, and

very probable that he would do so (*a*)]. And the defendant, having knowledge of the premises, negligently [and without any notice to the plaintiff] removed and displaced the board, and the plaintiff without any default on his part [stepping on the place where it had been put] fell and greatly injured himself.

Pleas: 1. Not guilty.

2. That the plaintiff did not put the said board to walk upon, nor was it necessary to walk thereupon, &c.

Keane for the plaintiff.

Shee, Serjt., for the defendant.

The plaintiff being examined, and he having stated that he was on the board at the time, and that it was pushed from under him, and this not agreeing with the declaration as it stood, he was cross-examined as to a statement he had made at the time of the accident, which was in accordance with it, and at variance with his present evidence.

Keane in re-examination produced a written statement he had given to his attorney on the 24th April, the declaration having been on the 5th May, and offered to put it in.

Shee, Serjt., objected, and

KEATING, J., declined to admit it.

At the close of the case for the plaintiff, *Shee*, Serjt., claimed a nonsuit, the declaration as framed not being sustained by the plaintiff's evidence.

Keane for the plaintiff applied to amend, by omitting the words in brackets.

Shee, Serjt., opposed the application, arguing that it would be very dangerous to allow a party, after having had his statement of his case deliberately framed on his

(*a*) These words had been inserted by amendment before trial; on which there was a demurrer; and it was now proposed again to omit them. *Vide post.*

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own instructions, and then before trial amended, to give evidence, after consultation, at variance with his statement of his case as so settled; and then at the last moment to have that statement altered, so as to agree with his altered account of the matter, and so as to get rid of a demurrer, and gain a verdict on a new case altogether.

KEATING, J.—I feel the force of that objection, and am very reluctant to allow the declaration to be re-amended, after having been drawn in accordance with the statement of the plaintiff, and then amended. Moreover, I am not aware of any case in which an amendment has been allowed after an amendment made on demurrer. My difficulty is, that the declaration is in a state in which the cause of action is doubtful, and then it is proposed at the trial to amend it in accordance with the plaintiff's evidence so as to make a good cause of action, but at variance with the declaration as previously drawn on his own statement. The jury could not find a verdict for the plaintiff on the declaration as it stands, and there is a demurrer to it. Under these circumstances, I doubt whether I ought to allow the amendment at all (*a*), and only do so, because if I disallow it my decision may be final; nor can I allow it except on these terms, that the trial be adjourned until after the next case, and that the plaintiff be at liberty to amend in the meanwhile on payment of costs.

Shee, Serjt., suggested that the costs would be pretty nearly the same as those of a nonsuit, and thereupon

Keane withdrew his application, and yielded to a

Nonsuit.

(*a*) The Common Law Procedure Act only allowing of such amendment as may be necessary in the existing suit to cause the real question in controversy between the parties; *i. e.*, the question in controversy before and at the time of trial. *Wilkin* v. *Reed*, 15 C. B. 145.

1859.

Court of Exchequer, Westminster, coram Pollock, C. B.

CROXON AND OTHERS *v.* MOSS AND OTHERS.

Hilary Term.

Where a correspondence as to the conversion of a railway debenture, payable in London, had been carried on between the owner, the plaintiff, and his brother, a clerk in the office of a stock-broker, in the stock-broker's *name*, and the debenture had been remitted by plaintiff to his brother to get it cashed, and, falling into the hands of his employer, the stock-broker, was by him presented to the defendants, bankers in Liverpool, who cashed it (less the discount), and were sued by the plaintiff for the amount, the stock-broker having failed: —*Held*, that it was a question of fact for the jury, whether the defendants were authorized to cash it.

TROVER and detinue for a railway debenture for 4,000*l.*

Pleas: Not guilty and non detinet.

Bovill, Tomlinson, and *Phipson* for the plaintiffs.

Sir *F. Kelly* and *Mellish* for the defendants.

The case was tried before POLLOCK, C. B., at the Middlesex Sittings after Michaelmas Term, 1859, when the facts appeared as follows:—

In June, 1857, the plaintiff (who lived at Oswestry) was the owner of a railway debenture for 4,000*l.* of the Eastern Counties Railway Company, due and payable on the 15th July, 1857, at Glyn's banking-house in London.

The defendants were bankers at Liverpool, where one Davis carried on business as Davis and Co. as a stock and share-broker, the plaintiff's brother, *Edward* Croxon, being clerk to Davis, and, *not* being a member of the Stock Exchange, was not competent in his own name to carry on business as a broker; and a commission would only be payable to the stock-broker who made the transfer.

Before the debenture became due correspondence took place between the plaintiff and his brother, as to a re-investment of the money in the same or another Company at the same rate of interest.

The correspondence on the part of the plaintiff was entirely with the Company, and his brother, and not at all with Davis; but his brother wrote to the Railway Company in the name of Davis and Co., and, as will be seen, the Company wrote to the plaintiff, alluding to letters, as received by them from Davis, as to which, however, the plaintiff, being cross-examined, swore that though he knew the matter was being carried on in the *name* of Davis, he did not know that *Davis* had any concern in it.

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CROXON and Others v. MOSS and Others.

On the 1st June, 1857, a letter in the name of Davis and Co. was written to the North-Eastern Railway Company in these terms :—"We are in a position to renew the bond for three years, at five per cent. interest, and one quarter commission to us." To this the secretary replied, by a letter addressed to Davis and Co., to the effect that four and three quarters per cent. was their maximum rate of interest, "and as to your claim for commission, we never allow it for *renewal* of loans." This was communicated to the plaintiff by a *private* letter from his brother, who asked, "Shall I offer it to the Great Western at five per cent.?" To this the plaintiff replied, "If you think there is any probability of their doing it, you can try the effect of a letter to the secretary, &c." On the 6th June, 1857, a letter in the name of Davis and Co., was then written to the Great Western Railway Company, who replied in a letter addressed to Davis and Co., and assenting to the offer. A copy of this was communicated to the plaintiff by his brother, in a private letter from himself. And on the 10th June the plaintiff replied *to him* thus :—"Arrange with the Great Western, &c., &c., *you* can explain that the 4,000*l.* is payable on the 15th, &c., &c." There had been *another* similar offer in the letters from Davis and Co. as to another sum of money: and this also having been assented to on the 12th, the secretary of the Great Western Company sent Davis and Co. an order on Glyn and Co., their bankers, to receive *that* sum. On the 13th June this was acknowledged in a letter from Davis and Co. ending thus: "We can now let you have 4,000*l.*, at five per cent., payable about the 15th next month, and a quarter per cent. commission to us." On the 15th June the Great Western Company wrote to Davis and Co. agreeing to this: and this was at once communicated to the plaintiff and his brother, as before, in a private letter ending thus: "The parties named in the debenture will have to sign a receipt on the document when it is about

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due. You can send it to me, when I will make the necessary money exchange." On the 18th June the plaintiff was informed, by a letter from the secretary of the North-Eastern Railway Company, that the debenture would be paid on the 15th July, "if presented at Glyn's, with a receipt in the subjoined form indorsed thereon." The form subjoined was as follows:—

"*Form of Receipt to be indorsed on the Bond and signed by the Mortgagee.*

"Received this day of 1859, of the North-Eastern Railway Company, the within-mentioned principal sum of £ , and I do hereby acknowledge to have received all interest due thereon."

(When taken by the defendant the debenture was indorsed with such a receipt signed by the plaintiff.)

The plaintiff, on the 23rd June, wrote to his brother: "I have had a letter from the Company that the 4,000*l.* will be paid at Glyn's, on the debenture being presented there, with receipt indorsed. Shall I send the debenture with the receipt indorsed to you, or how?"

The plaintiff's brother wrote back: "You had better send it to *me*, or the Great Western Railway Company may do me out of my commission."

For the brother to secure this commission, however, it was necessary for the reason already stated, (he not being a broker,) that the transfer should take place in the name of *Davis*. The plaintiff, on the 11th July, sent the debenture to his brother at Davis's with a receipt indorsed in the form before mentioned, being inclosed in a private letter to his brother.

On the 13th July the plaintiff's brother acknowledged the receipt of the debenture in a private letter to the plaintiff, in which he said "it will be attended to."

On the 15th July, the day before the debenture was due, Davis wrote to the North-Eastern Railway Company to

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know where it was to be presented, and they telegraphed "present at Glyn's." On the 16th July it was taken to the defendants by a clerk of Davis's (not the plaintiff's brother, but another), and being shown to them with the telegraphic message, they were asked to "cash" it: and they agreed to do so for 5*l.*, one eighth per cent. commission. And they accordingly paid Davis on that day the amount due upon it (less 5*l.*) on a cheque drawn on them, signed "Davis and Co."—"Pay 4,000*l.* to me or bearer." The debenture was then handed to the defendants, who sent it to their agents, Barclay and Co., in London, and through them received the amount from Glyn's; they handing Glyn's the debenture, and being credited in account for 4,000*l.* Davis then remitted 1,000*l.* to Glyn's, to be placed to the credit of the Great Western Railway Company, on account of the proposed debenture, but he paid no more. The plaintiff and his brother were not aware of this until August, when Davis died insolvent. Had the transaction been completed, according to the intention of the plaintiff, they would have simply transferred the amount to the credit of that Company: from whom the plaintiffs, through Davis, would have received their debenture. In September the debenture was demanded of the defendants on behalf of the plaintiffs, who then disavowed any authority to Davis. The defendants declared that they had paid it in the regular course of business, and denied any liability. The plaintiffs claimed the amount of the debenture, except the 1,000*l.* received by the Great Western Company.

The plaintiff was called, and swore that he did not know that the business was being carried on by Davis and Co.: that he had in May verbally instructed his brother to see to the re-investment of the money; and that on the 5th July, knowing that Glyn and Co. were the bankers of both Companies, he told his brother (by word of mouth) that all he would have to do would be to transmit the debenture to Glyn's, with directions to pay the money to the Great

Western Company, and that this was the only instruction he gave him about it. He further stated, on cross-examination, that though he knew his brother was not in business on his own account, his impression was that he was allowed to transact business for his own relations. The plaintiff's brother was called, and confirmed his evidence as to the instructions he received, and stated that he gave the debenture to Davis, and told him to send it up to Glyn and Co., (which Davis promised to do,) and that he had heard nothing more about it until towards the end of the month: and that he was not aware, until after Davis's death, that the debenture had *not* been sent to Glyn's.

There was some little discrepancy between the evidence of the clerk of Davis, who took the debenture to the defendants, and the defendants' clerk who received it, as to the precise terms employed by the former; whether it was that he asked that it should be "cashed" or "discounted," or paid and transmitted to Glyn's. One of the defendants was called, and stated that their charge for commission would have been the same, had they waited to hear that the debenture was paid in London before themselves paying for it; but that, *where they knew the person, they gave the money at once.* As already stated Davis banked with them, and most of the money (less the 1,000*l.* remitted to the Great Western Company) had been placed to his credit in their account.

On the part of the defendants it was contended that there was an implied authority to him to deal with the debenture as he had done.

The LORD CHIEF BARON was of opinion, that, as the instrument was not negotiable nor payable to bearer, and there was no authority from the plaintiff to Davis, the latter had no authority to receive the money, but reserved the point, and directed the verdict formally to be entered for the plaintiffs, for the balance of the amount of the deben-

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ture 3,000*l.*, and it was taken with interest; the plaintiff claiming it, the defendant disputing the claim; and the point being reserved, neither party asking that it should be submitted to the jury.

Verdict for the plaintiff, 3,000*l.* (*a*).

(*a*) Sir *F. Kelly*, on the part of the defendant, obtained a rule *nisi* to set aside the verdict on the ground that it was not proved that the defendant converted the debenture to his own use, or that he detained the plaintiffs' debenture; or had received money to the use of the plaintiffs, and also as to interest. Against this rule, cause was shown by *Bovill* and *Tomlinson* and the Court came to the conclusion that it was a question of fact *whether the debenture was put into the hands of Davis by the plaintiff or with his authority*; and ultimately, the *evidence* on that point not being satisfactory, ordered a new trial: but the case was settled.

Coram Bramwell, B.

1861.

Trinity Term.

A foreman, having bid at an auction for a large quantity of hay, &c. carried away by his master's carts; but his own name being given to and taken down by the clerk:—*Held*, that the question was whether he authorized the auctioneer to set his name down as bidder, or whether the auctioneer did not know he was only a servant, and understand that he was bidding for his master.

WILLIAMSON *v.* BARTON.

ACTION for goods sold.

Plea: never indebted.

Knowles and *Milward* for the plaintiff.

Huddleston and *Garth* for the defendant.

The plaintiff had some hay and straw put up for auction, and the auctioneer set forth the usual conditions *inter alia*, that the highest bidder should be the purchaser, that the goods should be removed in a certain time or re-sold, and that each lot should be considered as delivered on being knocked down, and on the conditions being complied with.

The defendant, who was in the service of one Smith, a large contractor, as foreman, attended at the auction, and bid for a quantity of hay and straw, to the amount of 120*l.* The auctioneer's clerk asked his name, and put it down as the bidder.

The hay and straw were taken away by Smith's carts, and consumed by his horses.

Smith had died, and the present action was brought.

The auctioneer was called on the part of the plaintiff, and admitted that he knew that defendant was in the service of Smith, but it was ambiguous whether he meant that he had known this at the time of the sale. On the other hand, he had not denied that he *had* known it. He did not deny that when he applied to the defendant for payment some months afterwards, and after Smith's death, the defendant said that he was not the real purchaser, and that Smith was. He further admitted that some year or two before he had sold Smith some stone through defendant.

The defendant was called, and did not deny that he knew his name was put down, nor did he state that he had said to the auctioneer at the time that he was not the real buyer, but that Smith was.

BRAMWELL, B. (to the jury).—Did the defendant authorize the auctioneer to put down his name as bidder? and was he the real buyer? With that view consider whether the auctioneer knew that he was foreman of Smith, and whether he might have reasonably understood that he was bidding for Smith? Even if there were an original contract with Barton, was there a subsequent implied contract with Smith, arising out of the delivery of the goods to and acceptance by him, with the knowledge of both parties? In either of these views find for the defendant.

Verdict for the defendant (*a*).

(*a*) *Knowles* got a rule, which was argued M. T. See *Holding* v. *Elliott*, 29 L. J., Ex. 134; *Boulton* v. *Jones*, 27 Ibid. 117. That an action for the *price* would not have lain against *Smith* after a re-sale to defendant, see *Lamond* v. *Devalle*, 9 Q. B. Rep. 1030. That a person leading another to *suppose* he is the purchaser *is* so, see *Cornish* v. *Abington*, 28 L. J., Ex. 262.

1861.

Coram Bramwell, B.

PENN *v.* STEADMAN.

Hilary Term.

In an action for falsely representing that a good living might be got at a certain public-house; evidence that, a year or two before plaintiff took to it, some one else found it impossible to get a living:—*Held*, admissible, the character of the house not having since changed.

ACTION for false representation, as to the value of a public-house, that it was a house where a good living could be got, and was doing so much a month.

Plea: not guilty.

In the course of the proof of plaintiff's case, it was proposed to call one Jones, who had kept the house for a year, 1858—59, to prove that he could not get a living in it.

This was objected to.

BRAMWELL, B.—There must be *some* evidence that the condition of the house has not changed since Jones had it, and then his account of it will be good evidence to falsify part of the representation made, viz., that a good living could be got at the house.

Pigott, Serjt., and *T. Atkinson*, for the plaintiff.

Parry, Serjt., *Hance*, and *Howard*, for the defendant.

Verdict for the plaintiff.

Coram Martin, B.

HUMPHREYS *v.* DUDDING.

Trinity Term.

An admission of a document by a party does not shut out a stamp objection.

DECLARATION for commission payable by the defendant to the plaintiff upon the purchase by the plaintiff, on behalf of the defendant, of the advowson of a certain rectory in the county of Lincoln.

Plea: never indebted.

Lush, Q.C. and *H. T. Cole* for the plaintiff.

Flowers and *Bristowe* for the defendant.

1861.

HUMPHREYS v. DUDDING.

On behalf of the plaintiff it was proved that he was a person carrying on the business of clerical agent in Saville Row, where he was called upon by the defendant in reference to an advertisement of an advowson that he had for sale. The plaintiff gave the defendant a printed list of the advowsons that he had for sale, upon which was printed the plaintiff's terms, viz., that he was to be paid a commission of one and a half per cent. by both buyer and seller, but he did not call the defendant's attention to these terms. The negotiation proceeded, and ultimately the defendant offered, by letter, the sum of 11,000*l.* for the advowson, this offer the plaintiff accepted on behalf of the vendor.

At the close of the plaintiff's case the defendant's counsel felt bound to admit that the sale had actually taken place, but

MARTIN, B., said:—It was formerly the practice for a judge at Nisi Prius, not to inquire into matters which were admitted on both sides, but I know Lord CAMPBELL has decided such a course to be wrong. I must therefore have the fact of the sale proved in the regular way before the plaintiff can be entitled to claim his commission from the defendant.

Lush, Q.C.—That being so, I must put in the letter constituting the agreement, and pay the stamp duty and penalty.

MARTIN, B.—Certainly, I am bound, sitting here, to see that the Queen's revenue is not defrauded.

The letter was then put in and read, and the plaintiff had a verdict for the whole amount claimed.

1861.

Coram Martin, B.

After Trinity Term.

SUNLEY AND ANOTHER *v.* CUNARD AND OTHERS.

It is for the jury with what intent payment of a bill has been made by an indorsee, and whether or not with such an understanding as to keep alive the liability of the drawer to him.

ACTION by the plaintiffs as indorsees of a bill of exchange for 550*l.* against the defendants as drawers. The defendants severed in pleading. Cunard, among other pleas, denying that the bill was drawn for partnership purposes. The other defendants denied the indorsement, and also pleaded that, before the indorsement to plaintiffs, Lamb, the acceptor, paid the bill to the Bank of London, the then holders.

It appeared that in April, 1860, Arrowsmith, one of the partners in the firm of Cunard and Co., had entered into a speculation with Lamb, the acceptor, for the exportation and sale of 12,000 muskets to the Garibaldians at Naples. The muskets were shipped and sold, and a bill was drawn by Arrowsmith, in the names of Cunard and Co., upon Lamb, and accepted by him, to provide for the freight, insurance, &c. of the muskets. After several renewals (of which the bill in question was one), it became necessary to provide for payment of the bill for 550*l.* That bill was then in the hands of the Bank of London, and Lamb consulted Sunley, one of the plaintiffs, as to the best mode of dealing with it. Sunley, at Lamb's instance, called on Arrowsmith, and not being able to get him to provide for the bill, Sunley and Lamb proceeded together to the Bank of London. They there saw the manager of the bank, and Sunley paid the amount, and obtained possession of the bill, the bank agreeing to indorse, but to prevent their liability, with the addition of the words "sans secours." It was now contended for the defendants, that Sunley having paid the bill for Lamb, the acceptor, the bill could not be sued upon, but was defunct. On the other hand it was contended that Sunley, by such payment, had purchased the bill of the bank and stood in their shoes.

1861.

SUNLEY and Another v. CUNARD and Others.

MARTIN, B., told the jury that it was entirely a question for them with what intention the bill had been paid by Sunley. If they thought that the arrangement was, that the bill should be kept alive, so that Sunley might sue upon it, he was now entitled to recover.

The jury found a verdict for the plaintiff.

Hoggins, Q.C., and *B. C. Robinson*, for the plaintiffs.

Honyman and *Watkyn Williams*, for the defendant Cunard.

M. Chambers, Q.C., and *Stammers*, for the other defendants.

Coram Martin, B.

CHARLTON AND ANOTHER *v.* ALLEN.

Trinity Term.

In an action for the price of goods sold, the question being on whose credit they were supplied, and the entries in the trader's books being doubtful, the question is for the jury.

THIS was an action for goods sold and delivered.

Plea: never indebted.

C. Pollock for the plaintiffs.

Knowles for the defendant.

The plaintiffs, Charlton and Thomas Allen, in February, 1856, were in partnership as upholsterers, and the goods were supplied at that time to *Charles* Allen, the son of the co-plaintiff *Thomas* Allen, in whose name the present action was brought by the other plaintiff.

The question in the cause was, whether the goods had been supplied to the credit of the son or the father.

The order-book—the book in which the goods were first entered—was *not produced*. The men who took the goods out of stock and who *loaded* them to the son were absent. The carman who delivered them at his house could have proved such *delivery*, but that was *admitted*.

In February, 1860, the plaintiffs dissolved partnership, and the estate and effects were taken by the plaintiff

1861.

CHARLTON and Another v. ALLEN.

Charlton at a valuation, which did not include this item. An account of it was sent to the co-plaintiff, and he said he would be answerable for it.

In *March* this action was brought against his *son*.

In the ledger the item was entered thus: "Mr. Allen (*Charles* Allen);" but the ledger clerk, who was called to prove the entry, said that the father, Thomas Allen, had remonstrated with him about the entry, and said it was one which he had done wrong to make.

And in the goods journal it was entered to Mr. Thomas Allen. The books were produced in Court. In the partnership ledger it was entered "Mr. (Thomas) Allen."

In the goods account, which was posted from the journal, it was entered thus:—

"To goods, 293*l*."

The plaintiff Charlton relied chiefly on the fact, that, in the *private* ledger of the partners, the item did not appear as a debt to his partner; but—

MARTIN, B.—The *contemporaneous* entry shows that *Charles* Allen was not debtor.

The clerk who kept the ledger was called, and said he made it up from the journal.

The journal being produced, the item appeared entered to "Allen," as debtor; the word "Charles" being written after, thus:—

"Allen (Charles), Dr. 293*l*."

There was no account in the ledger with *Charles* Allen.

Knowles, for the defendant, submitted that there was no case.

MARTIN, B.—I cannot say that; for entries in trade books are not like documents which a judge is to construe; but are to be looked at with all the other evidence in the case. The entry in the journal is ambiguous; the word "Charles" may have been put in after "Allen" merely as a memo-

randum to mark where the goods had been delivered. But that is for the jury, as it is a doubtful entry.

The defendant and his father the co-plaintiff were then called.

Verdict for the defendant.

MIDLAND CIRCUIT(a).

Leicester, coram Crompton, J.

MORRIS *v.* MILLER.

Spring Assizes.

In an action upon a promissory note, to which the defendant had pleaded that he did not make the note, leave was given to amend the pleadings upon the morning of the trial, by adding an equitable plea, that the defendant signed the note as a witness only, and not as a maker.

THIS was an action upon a promissory note, of which the following is a copy:—

"Nottingham, 4th Dec. 1858.

"We promise to pay to Mr. John Woodroffe Morris, on demand, the sum of one hundred pounds, bearing interest at five per cent. from the 8th day of January, 1858.

"John Miller.

"Joseph Freestone Miller.

"Mary Miller.

"£100."

The defendant, Joseph Freestone Miller, pleaded that he did not make the note.

At the opening of the Court,

Hayes, Serjt. (*O'Brien* with him), for the defendant, applied for leave to amend the record, by adding an equitable plea that the defendant signed the note as a witness and not as a maker.

Macaulay (*Merewether* with him), for the plaintiff, objected.—It is now too late to make the proposed amendment. The cause stands third on the cause list; and, as the two first causes involve the same issue, and the second will

(a) Reported by L. Cave, Esq.

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follow the result of the first, this cause, in point of fact, is the next that will be tried. Moreover, the defendant stated to the plaintiff's attorney, so long ago as the 23rd of last October, that he only signed the note as a witness. There has therefore been plenty of time for the defendant to have pleaded this defence before; and an amendment now would be unfair to the plaintiff, and ought not to be allowed.

CROMPTON, J.—I think I ought not to allow the amendment, without the strongest affidavits of the truth of the matter proposed to be pleaded. It is inconvenient to make the amendment now; and possibly the plaintiff is unprepared to try the issue sought to be imposed upon him at the last moment.

Hayes, Serjt.—The course now taken has been adopted because it was conceived that it would be a saving of expense. The plaintiff is perfectly aware of the proposed defence, which indeed has been insisted upon by the defendant from the very first, and is perfectly prepared to try that issue.

CROMPTON, J.—Would it not be better to refer the matter to some competent person, who should have power to decide all questions both of law and fact?

Macaulay.—The plaintiff would prefer to take the opinion of a jury.

CROMPTON, J.—Then I shall allow the amendment.

Order accordingly.

1861.

Nottingham, coram Crompton, J.

REGINA *v.* WILLIAM TAIT.

Spring Assizes.

Where in a criminal case a witness for the prosecution is so ill as not to be able to travel, the judge may, at his discretion, permit the deposition to be read to the jury, under the 11 & 12 Vict. c. 44, s. 17, or postpone the trial to the next assizes.

THE prisoner had been committed for trial at these assizes, upon a charge of having uttered a forged bill of exchange.

Bristowe, for the prosecution, applied, under the 11 & 12 Vict. c. 44, s. 17 (*a*), that the deposition of a witness, named Samuells, taken before the magistrates upon the preliminary investigation, might be read to the grand jury, on the ground that the witness was so ill as not to be able to travel.

Boden (*Huish* with him), for the prisoner, objected.—It is most important to the prisoner that this witness should be subjected to cross-examination. It is not stated that the illness is more than temporary; and, if the trial were to be postponed to the next assizes, the witness would probably be able to appear.

CROMPTON, J.—I am of opinion that the act is not imperative in all cases, and that I have a discretion either to permit the deposition to be read or to postpone the trial. Let the recognizances of the prosecutor and witnesses be enlarged; and let the case stand over to the next assizes.

Trial postponed.

(*a*) That section (after directing justices to take, in the manner therein mentioned, the statement on oath or affirmation of the witnesses appearing against any person charged before them with an indictable offence) enacts that, if afterwards, upon the trial of the person so accused, it shall be proved by the oath or affirmation of any credible witness, that any person whose deposition shall have been so taken as aforesaid is dead or so ill as not to be able to travel, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had full opportunity of cross-examining the witnesses, then, if such deposition purport to be signed by the justices by or before whom the same purport to have been taken, *it shall be lawful* to read such de-

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position as evidence in such prosecution without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same. In *Reg.* v. *Clements*, 2 Den. C. C. 251, it was held that this provision authorizes the reading of the depositions before the grand jury for the purpose of finding the bill as well as before the petty jury at the trial. But they cannot be read before the grand jury without medical evidence of the witness's illness. *Reg.* v. *Phillips*, 1 F. & F. 105.

Spring Assizes.

Coram Cockburn, C. J.

REGINA *v.* ROBERT WHITE AND JOHN DAVIS.

The prisoners were indicted for forging a bill of exchange. The bill purported to be accepted by one George Smith, and was directed to George Smith, draper, Birmingham. The direction was in the handwriting of the prisoner White, but the acceptance was not. George Smith, a draper at Birmingham, proved that the acceptance was not his; that he had made personal inquiries and consulted a directory, and could not discover that there was any other George Smith, a draper, at Birmingham. Letters were produced from White to Davis, in which the former requested the latter to get him blank bills signed by men of straw:—*Held*, first, that there was evidence to go to the jury that the George Smith who was called was the only draper of that name in Birmingham; second, that there was evidence for the jury that the name, George Smith, in the acceptance, was fictitious, and that the acceptance was not the genuine acceptance of a man of straw signing his real name. *Quære*, whether, if the acceptance had been the genuine acceptance of a man of straw, the directing the bill to George Smith, draper, Birmingham, with the fraudulent intention of inducing those to whom the bill was indorsed to suppose that the acceptance was the genuine acceptance of the last-named George Smith, amounted to a forgery of the acceptance.

THE prisoners were indicted for forging a bill of exchange, of which the following is a copy:— (*a*)

"£23 : 3*s.* 9*d.* Nottingham, *June* 13, 1860.

"*Three* months after date pay to *our* order the sum of *Twenty-three pounds three shillings*, value received.

"*Mr. George Smith,* *White, Brothers.*
Draper,
Birmingham."

"*Accepted payable at Messrs. Burgess & Co., Bankers, London,*
George Smith."

(*a*) The parts in italics, with the exception of the words "*George Smith*," at the end of the acceptance, were proved to be in the handwriting of the prisoner White. There was no evidence as to the handwriting of the words "George Smith." The rest of the bill was printed.

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There was a second count, charging the prisoners with uttering the said bill, knowing it to be forged.

Boden and *Bristowe* appeared for the prosecution.

Macaulay and *Merewether* defended White.

O'Brien defended Davis.

It appeared from the evidence, that White was in business with his brothers, as lace manufacturers, under the name of White, Brothers, and that Davis was a commercial traveller in their employment. In the early part of 1860, Davis received from White the following letter:—

"Dear Sir,—We dare not accept your kind offer, as your name is known here. You could do us a great service, if you could get us a lot of blank 3*d.* and 6*d.* bill stamps signed, so that we could pay them away occasionally. We could fill up the amounts to suit us. Now such men as which your samples about town would do it or any friend, because we never let them go back. Our name need never be mentioned. Mr. Benson has accommodated us, but as he is leaving us we cannot ask him. If we could work about 2,000*l.* in this way, it would enable us to give extended credit to our customers. Now if you can manage this department, it will be most valuable, and no risk to yourself; and I shall be at home to see all right. You can buy any quantity of bill stamps. Send them all addressed to me privately. Destroy this note.

"Yours faithfully,
"Robert White."

In May, 1860, Davis received other letters in the handwriting of White, of which the following are copies:—

"Nottingham, May 4th, 1860.

"Dear Sir,—I forwarded account to you to bank. I received the bill all right—do very well. Let me have the inclosed done the first opportunity—you only need let

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them sign their names across. I can make them payable myself.

"Yours truly,
"Robert White."

"P.S. I prefer the printed bills. I now enclose the plain ones."

"Nottingham, May 7th, 1860.

"Dear Sir,—We will advise you for Birmingham next Monday. The bills came safe. I have enclosed you a lot. When you get hold of a party, let him indorse about six with his name, and another party six, and so on.

"Yours truly,
"Robert White."

On the 23rd of June, the bill, the subject of the present indictment, was indorsed by the prisoner White to a Mr. Whaley, by whom it was paid into the bank, whence it was returned dishonored. Subsequently on being charged with forging the bill in question, Davis admitted that he had got it signed by a stranger, and produced the above letters as proving his innocence.

A Mr. George Smith, a draper, at Birmingham, was called, and proved that the words "George Smith" in the acceptance were not in his handwriting, and that he had made inquiries personally, and could not discover any other George Smith, a draper, in Birmingham, that he had also searched the directory, and that there did not appear to be any other George Smith, a draper, in Birmingham, from that.

Macaulay submitted that there was no case to go to the jury.—The prisoner is indicted for forging this bill of exchange. There is proof that the words "George Smith" in theacceptance are not in the handwriting of the George Smith who has been called; but there is no proof that they are not written by some other George Smith, or that the George Smith whose name is written across the bill is not a

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real person. From the letters that have been put in evidence it would appear that Davis was instructed by the prisoner White to procure genuine written acceptances, the acceptances of men of straw signing their own names. If Davis carried out these instructions, the bills in question would not be forgeries, they being accepted by real persons in their own names. If the signature is genuine, it is no forgery either of the acceptance or of the bill to address it to some person, not the acceptor, but bearing the same name, with a view to induce others to suppose that the person to whom it is addressed is the acceptor. Such conduct would perhaps amount to a false pretence, but could not be said to be a forgery of the bill. The real acceptor would be liable upon the bill. To direct a bill to Mr. George Smith, draper, Birmingham, such direction being no part of the acceptance, cannot amount to a forgery of the acceptance.

He also submitted that there was no sufficient evidence that the acceptance was not the acceptance of another George Smith, a draper in Birmingham. Birmingham contained 250,000 inhabitants; and it was not sufficient for a witness to say that he had made personal inquiries, and examined a directory.

Boden contended that there was *primâ facie* evidence that the signature "George Smith," in the acceptance, was altogether fictitious, and was not the real name of the person signing. He also submitted that, assuming the signature to be genuine, the directing the bill to Mr. George Smith, draper, Birmingham, for the fraudulent purpose of inducing others to believe that he was the acceptor of the bill, amounted to forgery. In *Reg* v. *Blenkinsop* (*a*), it was held, that the adding of a false address to the name of the drawer of a bill, while the bill was in the course of comple-

(*a*) 1 Den. C. C. 276.

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tion, in order to make the acceptance appear to be that of a different existing person, was a forgery.

COCKBURN, C. J.—I think that there is a case to go to the jury. There is some evidence that the George Smith who has been called is the only draper of that name living in Birmingham. If there is another George Smith, a draper there, he might have been called as a witness for the prisoner. I am also of opinion that there is some evidence that the name "George Smith" in the acceptance was fictitious, and that the acceptance was not the genuine acceptance of a man of straw signing his real name. With regard to the other point more difficulty may arise; and, if the jury find that Davis got the genuine acceptance of a real George Smith, and that White, in conjunction with Davis, converted it into the simulated acceptance of another George Smith, a draper at Birmingham, with the fraudulent intention of inducing those to whom he indorsed the bill to suppose that it was the genuine acceptance of George Smith, the draper, I will reserve a case.

The jury found that the prisoners got the acceptance signed in the name of George Smith, by a person not of the name of George Smith, and that the bill was filled up by White, and uttered with intent to make it appear that the signature was that of George Smith, draper, Birmingham.

His Lordship directed a verdict of *Guilty* to be entered.

1861.

Derby, coram Crompton, J.

REGINA *v.* JOHN BROWN.

Spring Assizes.

Quære, whether, upon the trial of an indictment for forging a bank note, evidence of what the prisoner has said respecting other bank notes is admissible. *Cooke's case* doubted (*a*)

THE prisoner was indicted for forging a bank note. A second count charged him with uttering the same, well knowing it to be forged.

Manson, for the prosecution, proposed to offer evidence of statements made by the prisoner, as to other bank notes, supposed to have been the subject of a guilty uttering by him.

CROMPTON, J.—It has been decided that such statements are not admissible in evidence (*a*).

Manson was aware that it had been so held, but contended that that decision was not founded upon a correct principle, and asked the Court to overrule it.

CROMPTON, J.—I confess that I entertain doubts upon the subject; but I think you had better not offer the evidence in question. I do not see the force of the reasoning upon which *Cooke's case* was decided; but I am not at present prepared to overrule it.

Verdict, Guilty.

(*a*) *Reg.* v. *Cooke*, 8 Car. & P. 586. [In the common case of uttering forged coin, it can be shown that there were such utterings on former occasions, as evidence of guilty knowledge. So as to receiving of stolen goods from the same party on other occasions: otherwise of a *different* party on a *subsequent* occasion. *Reg.* v. *Oddy*, 20 L. J., M. C. 198. "The rule which has prevailed in the case of indictments for uttering forged bank notes, of allowing evidence to be given of the uttering of other forged notes to *different* persons, has *gone* to *great lengths*." *Per* CAMPBELL, C. J., Ibid. 200.—W. F. F.]

1860.

Leicester, coram Bramwell, B.

REGINA *v.* JAMES ASHBY.

Winter Assizes.

Upon an indictment for the forgery of a check, dated "Knighton," and purporting to be drawn by John Hust, it was proved that no John Hust lived at Knighton who would be likely to keep an account with a banker:—*Held*, evidence to go to the jury that John Hust was a fictitious person.

THE prisoner was indicted for forging a check for 12*l.*, dated at Knighton, and purporting to be drawn on Messrs. Paget's Bank at Leicester by John Hust. A second count charged him with uttering the same, knowing it to be forged.

Maunsell and *Cave* appeared for the prosecution.

Roberts defended the prisoner.—It appeared that the prisoner, having purchased three horses and wanting 10*l.* to pay for them, requested a man named Whitwell to give him cash for the check in question. This Whitwell did, on the prisoner promising to bring him one of the three horses to keep as a security. The prisoner brought the horse; but subsequently, by a trick, obtained it from Whitwell without repaying him the money he had advanced upon the check. The check was subsequently presented at Messrs. Paget's Bank; but payment was refused, as the drawer was unknown there.

North, a clerk in Messrs. Paget's Bank, was called, and proved that the Messrs. Paget had no customer of the name of John Hust; that he, North, knew the village of Knighton, which was about one mile from Leicester, and that there was no one of the name of John Hust living there who would be likely to have an account with a banker.

Roberts submitted that there was no evidence that the check was a forgery.

BRAMWELL, B.—I think a *primâ facie* case has been made out. Messrs. Paget's clerk has sworn that there is no John Hust at Knighton who would be likely to keep a banking account. That is some evidence that

John Hust is a fictitious person. You must go to the jury. 1860.

REGINA v. JAMES ASHBY.

The prisoner was acquitted upon the first count, but convicted upon the second.

Warwick, coram Pollock, C. B.

HINTON *v.* DUFF.

Summer Assizes.

A bill appearing not to have been due when the writ issued, but the only plea being a denial of the acceptance:—*Held*, that the point did not arise at the trial, and *quære* as to an arrest of judgment.

ACTION on a bill of exchange for 100*l.*, accepted by the defendant, the bill being truly set out in the usual way, and the declaration having the usual allegation "that the bill was overdue."

Plea: denying the acceptance.

Field for the plaintiff.

Beasley for the defendant.

On the bill being put in, it appeared that it was not due until after the action was commenced, the writ having, as appeared by the record, been issued on the last of the days of grace; and thereupon,

Beasley objected that it did not sustain the issue; for that no such bill as was due was shown to have been accepted.

Field answered that the point did not arise, as the only plea was a denial of the acceptance (*a*), which only put in issue that a bill as stated in the declaration had been accepted by the defendant, and the bill was truly set out, and therefore supported the issue.

(*a*) In all actions on bills of exchange * * * a plea in denial must traverse some matter of fact; *exempli gratia*, the drawing or making or accepting or presenting a notice of dishonor, &c.

1860.

HINTON v. DUFF.

POLLOCK, C. B., was of that opinion, and directed a Verdict for the plaintiff(*a*).

(*a*) *Beasley* got a rule in C. P. in the *alternative*, for a new trial or an arrest of judgment. Where the date of a contract, as a bond or bill, is material, it is taken to be as declared on, *Cole* v. *Hawkins*, 1 Strange, 21; and the note or bill *as set out*, is admitted if *not* denied, *Bevis* v. *Linsell*, Ibid. 1149; and *that* therefore is in issue, *if* denied. But the count on a bill does not state the date; and though it states that on such a date the bill was made, that is clearly not material. The question then is, whether the allegation that the defendant made a note or bill, "which is overdue," is not in effect put in issue by the plea denying the making or accepting. Whether that is *part of the description* of the note or bill, or an independent allegation of the lapse of time, as in an action of covenant for rent, when the fact that rent is in arrear, was put in issue by a separate plea *riens in arrere*, and was so even before the new rules; and was not in issue under *non demisit*, though it would have been under *nil debet* in an action of *debt*. See *Gaskin* v. *Davis*, *ante*, p. 295. As the date of the bill is not stated in the count, can the judgment be arrested? as it cannot appear on the record, whether the bill was or was not due before writ. And assuming that the date is *not* stated in the count, a plea that the bill was not overdue as alleged could hardly be deemed a bad plea, for it would raise a substantial defence. The count, however, only alleges that the bill "is overdue," *i. e.*, at the time of *declaration;* whereas the old forms allege that the "bill *became* due," which, without more, would import that it became due before suit. The present form of allegation, however, equally points to a time subsequent to the acceptance, and therefore it should seem refers, not to the effect of the bill, but to the *lapse of time*.

In *Padwick* v. *Turner*, 11 Q. B. 124; *Harrison* v. *Clifton*, 17 L. J., Exch. 233; *Roberts* v. *Bethell*, 22 L. J., C. P. 69. And see, as to the defence, that the plaintiff was not the holder of the bill:—that it can only be raised by a distinct plea, *Barber* v. *Lemon*, 11 Q. B. 302.

1861.

NORTHERN CIRCUIT.

Liverpool, coram Wilde, B.

NORTH STAFFORDSHIRE LOAN AND DISCOUNT COMPANY *v.* WYTHIES.

Summer Assizes.

An application by the drawer of a bill on behalf of the acceptor for time:—*Held*, evidence from which a jury might infer that he had authorized an arrangement for renewal, dispensing with notice of dishonour; and *held*, that after dispensation *no* notice was necessary.

ACTION on a bill of exchange, drawn by the defendant on Plant and Co. and indorsed to the plaintiffs. The declaration, in one count alleged notice of presentment and dishonour, in another count, added at the trial by way of amendment, alleged that defendant dispensed with due notice, and that afterwards and within a reasonable time, notice was given. Issue.

Edward James for the plaintiffs.

Brett for the defendant.

The bill, at the request of the defendant, the drawer, was discounted by the plaintiffs about a week before it was due. It fell due on Monday the 4th February, 1861. On the 29th January the defendant, the drawer, was at the office of the plaintiffs, and stated that the acceptors, Plant and Co. were in difficulties, and would very likely not be able to meet the bill, for which reason he asked if the plaintiff would object to renew it. He was told that the directors would consider of it, and on the next day Plant called and made the same inquiry, and being asked if the drawer (the defendant) would agree, said that he would. There was no express evidence that the defendant had authorized or assented to this application. Plant was told to call on the Monday, the 4th February, the day on which the bill became due, on which day he *did* call, and was told that the directors would renew the bill, but that next day he must bring the defendant for the pur-

1861.

NORTH STAFFORDSHIRE LOAN AND DISCOUNT v. WYTHIES.

pose. The defendant did not come, nor did it appear that he had given any authority to Plant to make the arrangement. On the 6th February he called upon the plaintiffs and said he had considered the matter, and had resolved to have the matter wound up, when he was told that they would look to him for the amount of the bill. The bill was sent up to the London and Westminster Bank on the 8th February.

No notice of dishonour was ever given. The question was, whether there had been, on the part of the defendant, a dispensation with notice, and the counsel for the defendant contended that there was no evidence of it, but

The learned BARON left that question to the jury, and they found for the plaintiff(*a*).

(*a*) In Michaelmas Term, *James* moved but took nothing; the Court holding that there was evidence for the jury of a dispensation, and that after such dispensation no notice was necessary.

Liverpool, coram Martin, B.

EDMUNDSON *v.* THOMPSON AND BLAKEY.

Summer Assizes.

A., after an oral agreement to become the partner of B., having entered into a *written* agreement, *not* amounting to a partnership, and having for some time, during which goods were ordered in the way of the business, appeared on the premises, doing acts which might be done either by a partner or a manager, and not having allowed himself to be held out as partner:—*Held*, not liable, either as actual or ostensible partner.

ACTION for goods sold.

The defendant Thompson suffered judgment by default, the other defendant Blakey pleaded never indebted.

Bliss for the plaintiff.

Price and *Milward* for the defendant.

The goods were yarns, which had been supplied on the premises of the defendant Thompson in the way of his

business, between 7th February and 15th April, 1861, and the ground on which it was sought to charge the other defendant was, that a partnership had existed between them, or that he had held himself out, or allowed the other to hold him out, as partner with him.

The defendant Thompson, in January, 1861, had entered into negotiations with Blakey, as to a partnership with him in his business of cotton spinner, and an oral agreement was entered into by them on the 26th January, under which Blakey was to advance capital, and have a share of the profits, and in effect to become a partner. It was then understood, however, between them, that the agreement was to be reduced to writing; but the defendant Thompson wrote to the plaintiffs informing them of it. Blakey next day came to the place of business, and continued there till the end of March, being in the counting-house giving orders, stopping workmen, and doing all other acts which *might* either be those of a partner, or of a manager, using and writing the name of "Thompson and Co.," but *not* Thompson and *Blakey*. On the 2nd February, however, Blakey told Thompson he had altered his mind in one respect, that he meant to be clerk not partner, and this agreement, it was understood, should be put into writing. On the 6th February new books were opened in the name of "Thompson and Co.," Blakey himself being present when the books were bought. On the 14th February the agreement in writing was signed; which stipulated that Thompson should pay Blakey a salary equal in amount to one-third of the net profits; the agreement was to make them partners; but Thompson, at the end of three years to admit Blakey as partner.

The goods sued for were *partly* and principally, supplied *after* this written agreement, the first item being 9th February; the third on the 15th February, and the rest of the supplies between that date and 15th April.

1861.

EDMUNDSON v. THOMPSON and BLAKEY.

The defendant Blakey, as already mentioned, remained on the business premises till the end of March, doing acts which might be done either by a partner or a manager.

The other defendant, Thompson, introduced Blakey as partner to various persons, but not to the plaintiffs.

Some of the orders for the goods were by Blakey signed "Thompson and Co."

It was proved that some of the persons to whom the co-defendant had introduced Blakey as his partner had told the plaintiffs of this.

But it was *not* proved that the defendant Blakey was aware of or had authorized any such representations, or that the plaintiffs knew of the original oral agreement.

MARTIN, B.—There were only two ways in which the defendant Blakey can be liable, as partner in fact, or as having held himself out as partner with the other defendant. As to a partnership in *fact*, the written agreement is what you must regard as the real agreement between the parties, as it was understood that the agreement should be reduced into writing. Then, as regards an *ostensible* partnership, there is no evidence of it; for there is nothing to show that the defendant Blakey authorized Thompson to hold him out as partner or held himself out as such. And the learned Judge therefore directed a nonsuit (*a*).

(*a*) *Bliss* moved in the Exch., but took nothing; the whole Court on consideration holding that the direction was right; that there was no partnership in fact, and no holding out as partner. See *Mulford* v. *Greffin*, vol. 1, p. 145.

1861.

Durham, coram Hill, J.

REGINA *v.* MORRIS BRYAN.

Spring Assizes.

When a contract has been entered into by reason of false representations, and goods or money obtained under the contract, it is too remote to charge the obtaining of the goods or money by the false pretences, and an indictment for false pretences cannot be sustained.

THE prisoner was indicted for having, on the 7th of January, at Sunderland, by falsely pretending that he was a member of the naval reserve, and entitled to receive 30*s.* for a quarter's payment next day, obtained from Arthur Calvert, of Sunderland, board and lodgings, at 14*s.* per week, and 6*d.* in money. The prisoner pleaded not guilty.

It appeared from the opening statement of the counsel for the prosecution that the prisoner went to a lodging-house in Sunderland, kept by the prosecutor Arthur Calvert, and there represented that he was a member of the naval reserve, and was entitled next day to receive 30*s.* for a quarter's payment. Believing this representation, the prosecutor agreed to let him have board and lodgings at his house for a week for 14*s.* The prisoner then said he was short of cash, and asked the prosecutor to lend him 6*d.* which he did. The prisoner remained some days at the prosecutor's, and it was then discovered that he was not a member of the naval reserve, nor entitled to receive any pay as such, and that he had no means of paying for his board and lodgings.

HILL, J.—How do you distinguish this case from *Regina* v. *Gardner* (*a*).

Meynell for the prosecution.—In this case money was obtained by reason of the false pretence, in addition to board and lodgings.

HILL, J.—I cannot distinguish this case from the *Queen* v. *Gardner*. (To the jury.)—You will return a verdict of not guilty, because, although the prisoner obtained

(*a*) 25 L. J., M. C. 100.

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REGINA v. MORRIS BRYAN.

money or goods from the prosecutor, he did it by means of a contract, and he obtained the contract only by means of the false pretences. It is too remote to say that he obtained the goods or money by the false pretences. The point has been decided, and I am bound by that decision.

The prisoner was then found not guilty, and ordered to be discharged.

Liverpool, coram Martin, B.

Summer Assizes.

HALL AND OTHERS *v.* DAY.

To make out a case of reputed ownership it is not enough to prove continued possession by the assignor, if the real ownership appears to have been known to creditors, and for aught that appears to *all* creditors.

TROVER, by the assignees of one R., an insolvent.

Pleas: not guilty and not possessed.

Temple and *T. Jones* for the plaintiff.

Edward James and *Heath* for the defendant.

The defendant claimed the goods under a bill of sale.

On the 13th December, 1859, the bill of sale was executed to the defendant by the insolvent for a valuable consideration.

The defendant was father-in-law of the insolvent.

On the 29th July, 1860, a *fi. fa.*, issued against R., the insolvent, at the suit of L., one of his assignees; and when the officer entered under the writ to seize the goods, they were claimed under the bill of sale by the defendant. This was communicated to the attorney and the judgment creditor, and the officer thereupon withdrew.

The insolvent, however, remained in possession until the arrest of the insolvent under a *ca. sa.* at the suit of the *same creditor*. Under that *ca. sa.* he went to prison, and on that imprisonment proceeded the insolvency under which the assignees now claimed the goods as having been in "the order and disposition of the insolvent" with the consent of the true owner, the defendant.

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On the other hand, it was contended that the claim under the *fi. fa.* known to the creditor and his attorney, took the case out of reputed ownership, as against the assignees.

The defendant was called, but his son-in-law, the insolvent, was not.

The defendant swore that, on the 28th July, the day before the officer entered under the *fi. fa.*, he had put a man in possession, although he permitted the insolvent to have the use of the goods.

There was no evidence that any creditor did *not* know of the bill of sale.

MARTIN, B., without leaving any question of fact to the jury, told them that the claim to the goods before the insolvency, known to one of the creditors and to the attorney, and to the sheriff's officer, was notice to all the creditors, and the assignees, of the *real* ownership, which prevented, as against them, at all events, any *reputed* ownership from arising, so that they could not recover. And he told the jury that they must find for the defendant.

The counsel for the plaintiff contended, that the question was a question of fact for the jury, and thereupon there was a

Nonsuit (*a*).

(*a*) Next term, *Temple* moved in the Exch., but the Court, after taking time to consider, refused a rule. They were at first disposed to doubt whether there was not a question of fact for the jury, but ultimately the Court arrived at the conclusion that there was no substantial evidence of reputed ownership to require that it should be left to the jury; for that the very evidence which showed the continued possession by the assignor, showed that the creditors knew the real ownership; and there was no evidence that any one was not aware of it, and if they had found for the plaintiff it would have been a wrong verdict. See *Graham* v. *Furber*, 24 L. J., C. P. 85; and see also *Bridger* v. *Whitehouse*, 29 L. J., Q. B. 73.

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WESTERN CIRCUIT (a).

Bristol, coram Byles, J.

Summer Assizes.

REGINA v. MATHIAS.

The use of a public footway includes that of a perambulator as a usual accompaniment of a large class of foot passengers, if of a size and weight not to inconvenience other passengers, and not to injure the soil.

Whether under the circumstances the use of such a vehicle be justifiable is a question of fact for the jury.

One of the public has no right to remove an encumbrance to the soil of a highway unless it be also a nuisance to the way.

The owner of the soil of a highway may remove anything thereon not justified by the easement though not a nuisance to the way.

INDICTMENT for an assault.

Plea: not guilty.

The prosecutrix pushing before her a perambulator 18 inches wide and 14 pounds weight, in which was an infant child, was passing along a public footway in Clifton, leading from a road into a square, the soil of which was in the defendant. The defendant disputing her right to such a use of the way, placed his hands upon her to prevent it, which was the assault complained of. The case for the prosecution being closed,

Montague Smith for the defendant.—There is no case for the jury. This was a footway, and the prosecutrix was going there with a carriage. She was therefore using the property of the defendant in a way she was not authorized to do, and the defendant was justified in preventing it. There has been always a clear distinction between a right of way on foot and one with horses and cattle, and carriages. The using such a way with a vehicle of any description, as a handcart, wheelbarrow, Bath chair, or perambulator, was unauthorized by the right. It cannot be said that all carriages, not drawn by beasts of burden, might be used on a footway, otherwise a steam-carriage, or one containing a popular member of parliament drawn by enthusiastic constituents might be so used. The use of a carriage on wheels might interfere with the proper public use of the way. The 72nd section of 5 & 6 Will. 4, c. 50, the

(a) Reported by J. B. Rowley, Esq.

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General Highway Act, favours this part of the argument. Wicket gates and stiles are common on footways, which exclude by their very existence any notion of wheel carriages. A perambulator, though small and light enough to be carried, is intended to be wheeled, and with its three wheels may make indentations on the ground wherever it goes. If a perambulator be admitted on a footway, where is the line to be drawn, as to what carriages shall be excluded from it—could butchers' and bakers' handcarts be excluded? When a man had granted a right of way on foot over his property, it was going beyond his grant to use hand carriages or carts. The perambulator, in this case, was a small one adapted for one child. But supposing a large one capable of holding several, would that be excluded, if this were admitted? Is the time of the Courts to be occupied by discussions as to the precise limits of size and weight, at which these vehicles may, or may not, be used. The question is one of law for the Court.

Karslake for the prosecution.—The question is a mixed one of law and fact for the jury. There is no English authority on the subject, but in the second edition of Gale on Easements (*a*), there is a reference to the civil law, in which a right *vehiculum ducere* is spoken of, but the manner in which it was exercised does not appear. There are privileges appertaining to the use of a footway. It is clear that a person may use a stick, or carry a parcel, or basket, or drag one along the ground after him. It is to be presumed that the dedicator intended that the public should have the enjoyment of the right in the ordinary and usual way. A perambulator is not a carriage in the ordinary sense of the word. It is used by a pedestrian, and may be taken up and carried, as it was here on the occasion of the assault. Such a vehicle may be reasonably used on a footway. As

(*a*) Page 201.

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well might the defendant object to a child wheeling its toy cart along the footway. It is admitted that vehicles of this description are in common use throughout the country. There is no sufficient reason for excluding their use on a footway dedicated to the public.

BYLES, J.—As at present advised, I think this is a mixed question of law and fact, and that it must go to the jury. If, however, the Court should be of opinion that the question is for me, and that I ought to have decided it for the defendant, I reserve leave to move.

After *Montague Smith* had addressed the jury for the defendant,

BYLES, J. (summing up). — This case involves the proper mode of using a footway, and the question for your consideration upon this indictment is, was this perambulator a vehicle, the use of which would justify the defendant in removing it, and assaulting the prosecutrix for that purpose. It is a question of general importance, because it may apply, not merely to this particular footway in Clifton, but to all the footways in the kingdom, including those in large and populous towns. The defendant was armed with a double set of rights upon this occasion. First, he had, as one of the public, a right to remove a nuisance to the highway, and next, as owner of the soil, he had a right to remove anything encumbering it. As to the first, suppose the case of a ferocious dog, or wheel carriage, used by horses, or a steam carriage on a footway, as a jury would probably find these to be nuisances, any one of the public would have a right to remove them. But there might be many things on a footway which ought not to be there, but not being nuisances, interfering with the convenient use of the way by passengers, one of the public would have no right to remove. If you should think that this perambulator ought not to have been there, but that it did

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not amount to a nuisance to the way, the defendant, as one of the public, had no right to remove it. But next, he is owner of the soil, and as such has a larger right than one of the public merely would have. For as owner of the soil of the footway he had a right to remove, not only nuisances to the way, but anything thereon, the presence of which was not justified by the nature of the easement. The easement in this case is a public right of "footway." But it is not easy to furnish a definition of that word. It cannot certainly be taken literally.

But to go a little further. There are what are called go-carts, consisting of three sticks, with very small wheels, the child's feet touching the ground, and propelling itself, or being propelled. Would this be a proper use of a footway? Or take the cases already put, of a toy-carriage, or horse on wheels. A man might probably carry another along a footway, but a woman might certainly carry a child. And, if so, may she not put it in a go-cart or perambulator? My direction to you is, that the owner of the soil may remove anything that encumbers his close, except such things as are usual accompaniments of a large class of foot passengers, being so small and light, as neither to be a nuisance to other passengers or injurious to the soil. I do not by this imply that he may remove things that are large. It is difficult to draw the line, and I don't intend to do so, as it is not necessary that I should. I confine myself to the present case. If you are of opinion that this perambulator comes within the description of the things, as to which I have just directed you, you will find for the prosecution, if not for the defendant.

The jury retired, but could not agree. On their return they requested an explanation of the word "nuisance."

BYLES, J.—A nuisance to a way is that which prevents the convenient use of the way by passengers.—[A *Juror*. I don't object to them, but I think the owner of the soil

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had a right to object to its going over his land.]—You must take the law from me. If you find that this perambulator was within the description I mentioned, I tell you as matter of law he had no right to object. I will put the propositions separately.

1. As to its being a usual accompaniment.
2. As to the size and weight, with reference to nuisance.
3. As to its injuring the soil.

The jury again retired, and on their return said that they had only agreed to the affirmative of the first proposition.

BYLES, J.—Now you have said so, I will say there is really no doubt at all about it.

Ultimately the jury not agreeing were discharged, being, it was said, equally divided.

Jury discharged.

Karslake, *Storie*, and *Prideaux* for the prosecution.

Montague Smith and *Edlin* for the defence.

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SOUTH WALES CIRCUIT.

Chester, coram Bramwell, B.

BLAKE *v.* DONE.

Summer Assizes.

A Judge has power, in ejectment, to amend, at the trial, by adding names of parties in whom the legal estate is vested, so as to raise the real question.

EJECTMENT.

Welsby and *Morgan Lloyd* for the plaintiff.

Grove and *Pulling* for the defendant.

The plaintiff claimed, as mortgagee of Edward Done, whose title was derived from one John Done, his grandfather.

John Done, in 1823, devised the property to his son John, as the plaintiff alleged, in fee tail, who had devised the property to two persons named Heath and Eardley, in trust for the benefit of Edward Done and his issue. The defendant was the heir at law of the testator, and disputed the will on the grounds of his mental imbecility.

At the close of the plaintiff's case, *Grove*, for the defendant, objected, 1, that the first will did not give an estate in fee tail to John Done, which question was reserved.

2. That the second will gave the legal estate to the two trustees, who therefore should have sued.

Welsby, for the plaintiff, admitted this, and applied for leave to amend the writ and proceedings by adding the names of the two trustees, who were both in Court and consented (*a*), they being ready to give their consent under

(*a*) And with respect to the joinder of parties to *actions*, &c. Sect. 35. In case it shall appear at the trial of *any* action, that there has been a misjoinder of plaintiffs, or that some person or persons not joined as plaintiff or plaintiffs, ought to have been so joined * * * such nonjoinder or misjoinder may be amended as a variance, &c., if it shall appear, &c. (as to which *vide* next note). It has been held that these sections, as to other actions, override the general clause (s. 222), as to amendment (*Robson* v. *Doyle*, 3 E. & B. 396); but if these clauses do *not* apply to the action of ejectment, *that* clause will enable the Court to amend for nonjoinder or misjoinder of parties. And as there is no special clause as to amendment for that purpose

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that enactment (*a*), and its only object being to remedy a mere mistake as to the names, not to cause a new title.

in ejectment (unless it be s. 221), there is no power to amend at the trial at all in such case, unless either under these clauses or the clause just referred to, which provides, that the several Courts and Judges shall and may exercise over the proceedings the like jurisdiction as heretofore exercised in the action of ejectment, so as to ensure a trial of the title. Before the C. L. P. Act, there was a power of amending by introducing demises by other parties, and there must at least be as great a power now. Before the act it was no doubt held that, under the stat. 3 & 4 Will. 4, c. 42, s. 23 (still unrepealed), the Court could not amend by striking out the name of the wife in a joint demise by her husband and herself, but the reason given was, that it would be in fact amending the title, or the name of the plaintiff, for it would appear from the record that the husband only claimed in right of his wife; and the defendants came to contest that the wife had the legal estate: whereas, by the amendment, he would claim it in his own right: and so on some title totally different (*Doe* d. *Wilton* v. *Beck*, 22 L. J., C. P. 6), and the very reason for the decision implies that even under that *former* act, still in force, the Judges have the power of striking out or adding names of parties, provided the variance is not "material to the merits." At all events, that case only shows that the amendment could not be made under *that* statute, where it evaded the question the parties came to try, and introduced a wholly new title. Nor, under the present act, could that be done, either by amending to the extent of getting rid of the parties (plaintiffs) on the record altogether, or altering them so as to bring in a new title, not the title which the parties came to try. For it has been held that the names of parties cannot in *any* action be altered, if it appears that the non-joinder or misjoinder was not by *mistake*, but by design, to try the right (*Wickens* v. *Steel*, 26 L. J., C. P. 241). And so in ejectment, if it appears that the object of the insertion or omission of the names was to try a question of title, and that the object of the amendment is to try another and a different title, no doubt the application would be refused.

No doubt the stat. 3 & 4 Will. 4 does not apply where the amendment is material to the merits, whether or not it is material for the "real question in controversy between the parties;" but if the question is one of mere mistake in a name more or less, and the title is the same, it should seem *not* to be material to the merits. If, however, the question must be decided on the terms of the C. L. P. Act alone, it is to be observed, that, although it has been held that ejectment does not come under the term "*personal actions*"

(*b*) See n. (*a*), post, p. 577.

Grove, for the defendant, opposed the application, and claimed the costs.

BRAMWELL, B.—If the defendant will consent to a verdict for the plaintiff, I will make the amount only on condition of his paying all the costs.

(*Doe* d. *Gillett* v. *Roe*, 1 C., M. & R. 19), so that it clearly would not come under the *first* part of the C. L. P. Act, where that phrase is used. The expression is carefully *altered* in the *second* part of the act, in the preamble to sect. 34, "with respect to the joinder of parties to *actions*:"—"at the trial of *any* action." And it is to be added that the preamble to sect. 41, seems to embrace the action of ejectment, which is carefully *excepted* in the enactment itself. And so, sect. 46, as to special case, seems, for the same reason, to include that action. And ejectment was held not included in the clauses of the Act of 1854, as to equitable pleading, simply because there are *no* pleadings in ejectment (*Neave* v. *Avery*, 16 C. B. 328); for which reason, of course, the action cannot be comprised in that section of the Act of 1852, which relates to pleading. But it clearly is included in all the other sections as to notice to produce and admit, trial, judgment, execution, and the like. And so in the Act of 1854, as to discovery or interrogatory, and the procedure at *nisi prius*. The scope of the C. L. P. Act seems to be first to give such enactments as are applicable to *all* actions, and then such as are peculiar to *particular* actions. For which reason there is no *particular* provision as to amendment in ejectment, by adding or omitting parties, except as aforesaid. So that it should seem either under the old jurisdiction of the Courts, or under the act of 3 & 4 Will. 4, or under the above enactment, there *is* power to add or omit names of plaintiffs in ejectment, provided it does not alter the title to be tried.

(*a*) If it shall appear to the Judge that such misjoinder or non-joinder was not for the purpose of obtaining undue advantage, *and* that injustice will not be done by such amendment, *and* that the person or persons to be added consent (either in person or by writing) to be so joined, *or* that the person or persons to be struck out were originally introduced without their consent, *or* that they consent to be struck out, &c. The "injustice" here, it is obvious, must mean injustice to the *defendant*, for the plaintiffs on the record *apply*; and the parties to be added must *consent*. And the injustice to defendant must mean such injustice as pointed out in the cases cited *supra*, of being suddenly called upon to meet a new title, and try a different question from that which he came to try; which cannot be, if there was even a mere *mistake*, and the title is the same. See *Wickens* v. *Ste* , 26 L. J., C. P. 241.

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Grove did not assent to this; and

BRAMWELL, B., said he should allow the amendment by adding the names of the trustees, reserving the question of costs.

Grove objected that there would then be a misjoinder, as, if the legal estate was in the trustees, Blake ought not to be joined, and his name should be struck out, the result of which would be an entire *substitution* of the trustees for Blake, which was not within the power of amendment given by the Common Law Procedure Act, 1852.

BRAMWELL, B., said he should make the amendment.

The defendant's case was then gone into, and the main question was left to the jury, who found a

Verdict for the plaintiff (*a*).

(*a*) In *Sawyer* v. *Ottley*, 1 Fost. & Fin. 637, ERLE C. J., allowed an amendment to be made, at the trial of an action of ejectment, by adding the name of a person having a joint legal interest with the plaintiff. Here, however, Blake, the only original plaintiff, had *no* legal interest at all. The writ, however, may contain the names of all the parties in whom the title is *supposed* to be, and verdict be entered for "some one or other of them" (C. L. P. Act, 1852, sect. 169), and here Blake's name was not struck out, so that the *action* continued to be by Blake, and the only amendment required or made was by *addition*. The scope of the C. L. P. Act, as to amendment at the trial, seems to be to allow at the trial such amendments as might take place *before* trial; as to which the general principle is laid down (as regards other actions) in *Gibson* v. *Varley*, 26 L. J., Q. B. 79, viz., that names of plaintiffs may be added to remedy *mistake* in the *names*, and to carry out the original intention of the plaintiff. And this is the principle applied to all other amendments (*Wickens* v. *Steel*, 26 L. J., C. P. 241). The question whether there is *any* power in ejectment to amend by adding at the trial names of plaintiffs omitted by mistake, is quite distinct from that of amending so as to raise a different title. The title of cestui que trust is in equity the same as his trustees, and in law their titles are not adverse (*Garwood* v. *Tuck*, 8 C. B. 231).

In M. T., *Grove* got a rule *nisi* in the Exch. but it was discharged.

Vide Frampton v. *Williams* on the Home Circuit, *post*, p. 603.

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HOME CIRCUIT.

Maidstone, coram Byles, J.

REGINA *v.* EYRE. (*a*).

Winter Assizes.

RAPE.

In rape, not only what the prosecutrix said immediately after the occasion, but what was said in answer to her, is evidence.

Russell for the prosecution.

Barrow for the defence.

The prosecutrix, being examined in chief, was asked as usual whether she had made any complaint, and having answered that she had, to certain persons, she was then asked, "What did you say?"—whereupon,

Barrow objected; but

BYLES, J., said, Whatever she said, immediately after the occasion and what was said to her in answer, is equally evidence. It may be, for particular reasons, that neither the counsel for the prosecutrix nor the prisoner may like to ask the question as to what was said to her; but it is my duty as Judge to stand independent between the prisoner and the Crown, and I should not shrink from asking the question myself.

The prisoner was acquitted.

(*a*) Reported ex relatione Barrow.

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THE QUEEN v. FRANZ.

the prisoner as one of them with more or less distinctness. They were traced walking towards London on the 11th, and would have reached London probably on the 12th, the day on which the prisoner, with a foreigner, were found entering London, fatigued and in search of washing and refreshment, as if they had been out all night. And the prisoner's things were tied with a string, which tallied with that found about the corpse, and both pieces were identified by the *maker*, who had sold string to the seller, at Reigate, who had identified the prisoner as the purchaser of string from him just before the murder.

The prisoner called no witnesses (*a*).

BLACKBURN, J.—The first question is, has the crime been committed? That must be determined before you can say whether the prisoner is guilty of it. You will hardly have a doubt here that a murder has been committed by some one. As matter of law, if you are satisfied that when the deceased met her death from violence by any person or persons to enable them to commit a burglary (or any other felony), although those who inflicted that degree of violence might not have intended to kill her (probably you think so here, and merely to stop her outcry in calling for assistance), all who are parties to that violence are guilty of murder.

You need not take on yourselves the responsibility of that. I take that on myself. The great question for you is, whether, taking all the circumstances, it is made out to your satisfaction that the prisoner was one of those who inflicted that violence.

The whole case turns on circumstantial evidence; *i. e.*, no eyes have witnessed the act. You are to weigh each

(*a*) His statement being, that his papers had been stolen at *Leeds*. It must have been by some person, who on the 7th of June had a letter from Madame Tietjens in *London*, and on the 10th was at Reigate, on the scene of the murder. (*Vide ante*, p. 580.)

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On the 12th of June, two days after the murder, the prisoner and another foreigner were in Whitechapel, where they went to a lodging-house, and where the *other* left him.

On the 16th or 17th of June, the prisoner (as it appeared by his subsequent statement) had heard that two Germans, Franz and Kron, were suspected of the murder.

On the 23rd of June, the prisoner, being in Newgate for some offence, was there told of this charge with the usual caution, and gave a false name, stating that he had come from Hull through Leeds, and had lost his papers.

On the 27th of June, being brought up for the first time on this charge, he gave the false name, and declared he had never been at Reigate.

After a remand, he was brought up again on the 1st July, and the discovery of the pocket-book, &c. was stated in his presence. On the 8th he was brought up again, after a week's remand; and, after hearing all the evidence, he made a statement (*a*). He declared that he was thus robbed both of his pocket-book and "pass," his papers, and some of his clothes; and he accounted for his identification by suggesting that the murderer had worn his coat and dropped his pocket-book and papers on the spot.

He said one of the foreigners was called Kron, and among the papers found in his pocket-book was a letter to Kron.

He did not in his statement make any allusion to the foreigner with whom he had gone to the lodging-house on the 12th June.

Many witnesses swore to seeing *two* foreigners at or near the place about the time of the murder, and identified

(*a*) *Sed vide suprà.* It was made several days after hearing that he was suspected and pursued, and he had *not* told the story of the robbery at the lodging-house, nor did he account for his companion there.

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the piece of wood." The policeman accordingly went close to the jury, but not into the *jury box*.]

Not guilty (*a*).

(*a*) This case, apart from the question of law as to constructive murder, is one of the most remarkable instances of presumptive evidence, as to which Hale says, "In some cases presumptive evidences go far to prove a person guilty, though there be no express proof of the fact to be committed by him, but then it must *be very warily pressed*, for it is better that five guilty persons should escape unpunished, than that one innocent person should die (vol. ii. 288) And it is remarkable that the illustration which Hale gives, is that of a man, who was found with stolen goods in his possession, soon after the robbery, and, not being able to account for their possession was condemned and executed, whereas in fact, as it afterwards turned out, the real robber had passed the stolen property to him, under some pretext, in order to facilitate his own escape. This was precisely the defence set up in *Reg.* v. *Manzano*. (*Vide ante*, p. 64.)

With regard to the point of law as to which the learned Judge directed the jury, it will be observed, that he implied that the prisoner must either actively or passively have been a party, not only to the burglary, but the personal injury, and did not put the case on the old doctrine laid down in Hale (vol. i. 439) but long since exploded, that the merely being a party to a burglary, even though absent from the actual scene of violence, may, in the event of death ensuing, make the crime of murder. The learned Judge, however, laid it down, that although *neither* party had the design to kill, and the evidence (as he appeared to think) clearly indicated they had *not*, yet the violence being unlawful, and in the prosecution of a felony, and death ensuing, the offence amounted to murder.

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Croydon, coram Williams, J.

PAULE *v.* GODING.

Summer Assizes.

There cannot be a nonsuit if there is any issue on which there is evidence for the jury, and the plaintiff declines to withdraw it from them.

Cohabitation by a man, for many years, with a woman, and introducing her as his wife, admitted as some evidence of a marriage, in an action by a third party against him as her husband, for necessaries or money supplied to her.

There is no authority in law, in a married woman, living apart from her husband, to borrow money on his credit.

DECLARATION for money lent and advanced to the defendant's wife A. B. for her support.

Pleas: 1. Never indebted, except as to 36*l.* paid into Court; and

2. That the said A. B. was not nor is the wife of the defendant. Issue.

Chambers, Hawkins, and *Butler Rigby,* for the plaintiff.

Bovill and *J. Brown,* for the defendant.

The defendant's daughter, about twenty, was called, and stated, that so long as she could remember, her mother had lived with him apparently as his wife, and had introduced them to the neighbouring gentry as his wife and daughter. That towards the end of last year disagreements had taken place, and that she and her mother had lived in separate apartments and endured various discomforts, which she described, but which did not appear to amount to absolute deprivation of necessaries, nor any downright ill-usage. That they left him in January for a visit, and at their return found their apartments locked, whereupon they, being refused the key, left the house and had not returned. It did not appear that they had applied for any other rooms, or that they had been actually expelled, and it rather appeared from the sequel, that they had left voluntarily. They put themselves under the protection of the plaintiff, an attorney, who opened a communication with the defendant on their behalf. He then denied that he had been married to the lady, and disclaimed all responsibility for her, but entered into negotiations as to a provision for her and her daughter, on condition of the latter separating from her. The daughter, however, refused either to separate from her mother or to return to her father,

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and the negotiations broke off. Meanwhile the plaintiff had been making advances to the lady and her daughter for their support, which the daughter proved, the money having been chiefly paid to *her*, though she stated that it had been applied and expended by her mother for their joint support. It did not appear distinctly that the defendant had been *informed* of these advances, but it rather appeared that he was aware that some advances were being made during the negotiations, and in February, when the negotiations were broken off, he declared that he would not sanction advances, except on condition of the daughter leaving her mother. The money paid into Court was sufficient to satisfy these advances. But they went on up to shortly before action, and to the amount of nearly 180*l.*, at the rate of about 5*l.* a week.

Early, however, in the course of the communications, the plaintiff informed the defendant that they were maintained at his cost, but, except on the condition before mentioned, the defendant never assented to their being so maintained, and on cross-examination his daughter admitted that the plaintiff had so stated to her, that her father had declared he would *not* assent to it. It further appeared that the daughter and her brother were entitled to some property, and that the plaintiff had taken an assignment of the brother's reversionary interest for the advances. The letters contained no authority to the plaintiff to make advances, beyond what is above stated. The mother was not called, nor was the plaintiff, and the case rested on the evidence of the daughter, and the letters, in proof of a conversation in which the defendant's former attorney was informed that the plaintiff was providing for his wife and daughter, and stated that he was sure the defendant would act honourably. This, however, was merely in the course of the negotiations.

It appeared, also, that the lady had stated she had an allowance of 80*l.* a year from a former husband.

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At the close of the case for the plaintiff, there being no actual proof of a marriage,

Bovill submitted that there must be a nonsuit.—Even assuming that the lady is the wife of the defendant (though there is no proof that she is), she was a wife living apart from her husband, and with a separate maintenance. There is no authority implied, even to contract for necessaries, under these circumstances, but this is not an action for necessaries, nor by the person who supplied her, but it is an action for money *lent* to her; and there is no authority in a wife, living apart from her husband, to borrow money on his credit. There is here no attempt to show an actual authority, and there is no implied authority, at all events beyond the time up to which the money is paid into Court. Moreover, there is no evidence that the advances were made on the credit of the defendant, and there is evidence that they were *not*, but upon the credit of the son's reversionary interest.

M. Chambers for the plaintiff.—There is evidence that the defendant turned his wife out of doors, and there is an authority implied in law to contract for what is necessary.

WILLIAMS, J.—The action is not for necessaries, nor is it brought by a person who has supplied necessaries. There is no proof of any authority to borrow money, beyond the time up to which money is paid into Court.

Chambers.—The defendant knew that they must be supported somehow, and that they were being supported by the plaintiff. That is sufficient as an authority.

Bovill.—There is no proof of any turning out of doors. On the contrary, it is alleged that they left voluntarily. There is no proof of ill-usage, and they refused to return to him.

WILLIAMS, J.—I am of opinion that there is no case. But then there is the issue on the plea, denying that she is his wife. I cannot *direct* a verdict on that, and unless

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the parties consent to get rid of that issue I must dispose of it, and there cannot be a nonsuit (*a*).

Bovill proposed to discharge the jury on it, or to get rid of it in any way, but

Chambers declined to assent, and thereupon

WILLIAMS, J., said there could not then be a nonsuit, and the cause proceeded, but ultimately ended in an arrangement.

(*a*) A Judge can never direct a *nonsuit*, unless the plaintiff consents to it as an alternative to a verdict for the defendant, which a Judge can direct, if there is no evidence. But he cannot if there is any issue, on where there is evidence. See *Lumley* v. *Allday*, 1 C. & J. 301.

Croydon, coram Williams, J.

DAVIS *v.* THE LONDON AND BRIGHTON RAILWAY COMPANY.

Summer Assizes.

In an action against a railway company for an injury sustained through falling down some stairs at their station :— *Held*, that it was not enough to show that the stairs were of improper condition or construction unless the fall was caused thereby.

DECLARATION, that at a certain station of the defendants there was, in their use and possession, a staircase for the descent of passengers, which was not in a reasonably safe, secure, proper, and commodious condition, nor of proper and safe construction, so as that, by reason of their neglect and default in that behalf, the plaintiff, while lawfully using and descending the same as a passenger by the defendants' railway and by their permission, slipped and fell, whereby she was injured, &c.

Pleas: not guilty, and the usual other traverses.

M. Chambers, *Parry*, Serjt., and *Harrison*, for the plaintiff.

Bovill, *Denman*, and *Hannen*, for the defendants.

On the 24th April, 1860, the plaintiff, an aged female, went to the station of the Company at New Cross, and having taken a ticket for their line was descending the

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stairs in question which led down to the railway, when her foot caught, and she fell down the stairs and sustained severe injuries. Her original statement was that her feet had caught, but her evidence now tended to show that both heel and toe had caught, and so she had been tripped up. The case on her part was that the stairs of deal had been lately mended with slips of oak nailed on the front of each step, which being stronger than deal, and therefore less worn, left a kind of groove on each step, in which the toe of the foot was likely to catch, while the heel was likely to catch on the projection of the oak slip on the preceding step. And several witnesses, some of whom had themselves fallen in the same way, gave evidence to this effect.

There was evidence that the steps had been on the morning in question somewhat wet, dirty, and slippery, by reason of the weather.

Witnesses were called to show that the steps had been repaired in the usual manner; and on the other side, to show that they should have been all of one wood, or faced with zinc.

WILLIAMS, J. (to the jury).—The question is, whether the injury was owing to the steps being in an improper condition, by reason of the negligence of the Company.

It is not enough that the stairs were of improper construction, or repaired in a mean or improper manner, unless they were of such a construction, or in such a condition, through the fault of the Company, as would be likely to, and did, cause the plaintiff to fall down them. And you must be satisfied, before you find for her, that they were in such a state, through their fault, that by *reason of that* she fell as she has described.

Verdict for the plaintiff, damages 600*l*.

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Coram Williams, J.

Summer Assizes.

HUMPHREYS *v.* STILWELL.

Words spoken by a medical officer to the steward of a public school, to the effect that the plaintiff, a butcher, who supplied it with meat, sold bad meat:—*Held*, privileged in the absence of malice.

SLANDER. The words charged were, that the plaintiff, a butcher, sold meat by the yard, and had been hooted out of the market: innuendo, that he sold bad meat.

Plea: not guilty.

Chambers and *Brown* for the plaintiff.

Bovill and *Garth* for the defendant.

The defendant was medical officer, and also a life governor, of a college or school. The plaintiff supplied the college with meat, and the words complained of were spoken by the defendant to the steward, in the course of some conversation as to one or two cases of illness among the boys, and complaints about the meat on their part. The steward repeated the words to the plaintiff, who thereupon brought this action.

The steward was the chief witness for the plaintiff, and stated that it was his duty to examine the meat, and report it if bad, and that to his knowledge no bad meat had been received from the plaintiff, though he admitted the fact of some complaints, and also of one or two boys having been sent home on account of illness.

The defendant was called, and stated that he conceived it his duty, as medical officer, to speak on the subject of the quality of the meat supplied to the school, that he had heard of complaints by the boys of bad meat, and that the nature of the illness of one or two of the boys, with the absence of any other assignable cause, suggested to his mind the notion that it might be the meat.

There was no evidence of actual malice, and the facts appeared rather to negative it.

WILLIAMS, J., told the jury that the communication was privileged (as the defendant might reasonably suppose it

was part of his duty,) if there was no malice; and left that question to them.

The jury found that the words were spoken without malice; and

WILLIAMS, J., directed a

Verdict for the defendant (*a*).

(*a*) Directing them at the same time to assess damages conditionally, in case the Court thought that he was wrong, which they did at 5*l*. The case was not moved. *Vide Maitland* v. *Bramwell*, *post*.

Coram Williams, J.

LEE *v.* FISHER.

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DECLARATION, that in consideration that the plaintiff would sell and deliver goods to one Leddiatt, on credit, to the amount of 200*l*. at least, the defendant guaranteed and promised to pay to him, on the production of the orders of Leddiatt, for the said goods the said 200*l*., viz., that is to say, 100*l*. out of the second draw, and 100*l*. out of the *third* draw, under the contract then in force between the defendant and Leddiatt, for the building of certain houses, and whereby Leddiatt was to receive from the defendant 800*l*. by "draws" or instalments, as in the contract mentioned.

Averment, that the plaintiff sold and delivered the goods, to wit, bricks, to Leddiatt, on his credit, to an amount exceeding 100*l*., and produced to the defendant orders of Leddiatt for the same, and that the said draws or instalments became due and payable from the defendant to Leddiatt, according to the contract.

General averment. Breach, non-payment.

Pleas (*inter alia*), that the plaintiff did not produce the orders, &c.

In an action on a guarantee that bricks supplied to a builder, for building a house for the defendant, should be paid, out of the money which might become due to the builder, the issue being whether the money had become due to the builder, he having apparently given up the contract to be completed by his employer: —*Held*, that the question was whether this transfer was real or colourable.

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4. As to 100*l.*, that the second draw did not become due and payable to Leddiatt.

5. That, before the second draw became due to Leddiatt, the contract between him and the defendant was ended, and the said draw never became due. Issue.

6. As to 100*l.*, that the third draw never became due to Leddiatt.

7. Similar to the 5th. Issue.

Demurrer to the 5th and 7th pleas, for not alleging that there was *notice* to the plaintiff before he supplied the bricks.

Chambers and *Philbrick* for the plaintiff.

Lush, *Denman* and *Crawford* for the defendant.

On the 19th September, 1860, the contract between the defendant and Leddiatt was entered into—the houses to be finished before the 20th March, 1861, for 850*l.*, of which 50*l.* was to be paid on signing the agreement, 300*l.* on the houses being roofed in, and 300*l.* on the floors being laid, and 200*l.* on the completion.

On the same day the defendant wrote to the plaintiff the guarantee declared on:—"Mr. Leddiatt has contracted to build for me two houses for 850*l.*, and I guarantee to pay to you, on the production of his orders, 200*l.*; 100*l.* out of his second draw; 100*l.* out of his third draw."

Leddiatt was present when this was written, and left with the defendant this written authority:—"I have agreed to leave in your hands 100*l.* out of the second draw of 300*l.*, and 100*l.* out of the balance on my contract with you to build two houses, and to pay the said sums to Mr. Lee, on his handing me an order and receipt as each payment becomes due on the contract."

Two authorities in writing, signed by Leddiatt, were handed to the defendant at the same time.

The houses were roofed in, and the first instalment of 300*l.* was paid to Leddiatt.

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On the 20th November he discontinued working, and soon after there was a sale of the plant, &c., which the defendant bought.

In March, 1861, the plaintiff wrote to the defendant, that as the houses were advancing towards completion, Leddiatt must be entitled to his second draw, and therefore that the first instalment of 100*l.* was due.

On the 28th March the defendant wrote to the plaintiff, that Leddiatt was not completing the houses.

In May this action was brought.

The defendant was called, and he swore that after the sale Leddiatt had nothing to do with the work, and that he had completed it himself, at a greater expense than the contract price. But he admitted that it was completed in a better manner; and it appeared that Leddiatt had given some kind of assistance in the way of advice or suggestion while the houses were being completed.

On the part of the plaintiff the case was, that the transfer of the work and plant by Leddiatt was merely colourable, and it appeared that the bricks had been supplied by the plaintiff *before* that transfer.

WILLIAMS, J. (to the jury).—The question is, whether there was a colourable transfer by covin or collusion between the defendant and Leddiatt; the latter *really* carrying on the work; and the object being merely to protect the property from the creditors of Leddiatt. If so, find for the plaintiff, for he is entitled under the guarantee.

Verdict for the plaintiff, 200*l.* (*a*).

(*a*) A rule *nisi* was granted in Exch., but merely on the ground of surprise.

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Coram Williams, J.

M'KEWAN *v.* THORNTON.

In an action on a banking guarantee, to take effect at once; plea, for a defence on *equitable* grounds, that it had been given on a misrepresentation by the plaintiff as to the state of the principal's banking account, and on an undertaking to return it if a partnership between the principal and the defendant did not take effect:—*Held*, that the *latter* part, alone, would not be any defence, and that therefore, if it alone was proved, the plaintiff should have leave to enter a verdict, and that to sustain the former part it must be shown, not only that there was a misrepresentation, but that the defendant *relied* upon it, and gave the guarantee on the *faith* of it:—*Held*, also, that questions as to complaints by defendant of the alleged misrepresentation were not collateral.

THE plaintiff sued as public officer of the London and County Banking Company, and the declaration stated that on the 23rd July, 1856, in consideration that the Banking Company would advance to one E. Smith, 5,000*l.*, from time to time, as he should require, the defendant promised the Banking Company that he would guarantee and hold them harmless from any loss that might arise to them, in consequence of such advances, and that it should be a *continuing* guarantee, to the extent of 5,000*l.*

Averment, that the co-partnership, relying on the guarantee, afterwards advanced to Smith divers sums, amounting to 5,000*l.*, and that in consequence of such advances a loss had arisen to them to that amount.

Breach: that the defendant had not held them harmless from the loss.

Plea: for a defence on equitable grounds—that E. Smith, when the defendant gave the guarantee, carried on business as a contractor, and kept a banking account with the co-partnership, and owed them a large sum. That the defendant also kept an account with the co-partnership, and had a large sum in their hands. That it was proposed that the defendant should become a partner of Smith in his said business, and that Smith represented to the defendant that he had large and lucrative contracts in hand, and wanted capital to carry them out, and that he owed the co-partnership a sum of 18,000*l.*, and he referred the defendant to the co-partnership and to the plaintiff, as the manager, in order that the defendant might make inquiries from him as to the pecuniary affairs of Smith, and the state of his account and his liabilities. That thereupon he applied to and made inquiries of the said co-partnership, and of the plaintiff as such manager, for the purpose of ascertaining the pecuniary liabilities of Smith, and that in answer to such

inquiries it was falsely and deceitfully represented to him by the co-partnership, and by the plaintiff as such manager, that the sum which Smith owed to the bank was 18,000*l.*, and that though he dealt in bills of exchange they did not know whether he dealt in them extensively. And that he was then worth 24,000*l.*, &c. That the defendant, upon the faith of the said representation being true, lent Smith 2,000*l.*, and gave to the co-partnership the guarantee declared on. But that, at the time when the representations were made to him, Smith owed to the co-partnership nearly 60,000*l.*, and was dealing extensively in bills, and was not worth 24,000*l.*, but was really insolvent, &c. And that before the defendant gave the guarantee, it was expressly represented to him, and agreed by the co-partnership, that the same should be cancelled and given back to him, in case the said intended partnership should not be formed.

Averment: that if he had known what the co-partnership knew respecting the pecuniary position of Smith he would not have entertained the proposal of becoming a partner with him, and would not have given the guarantee nor lent the money. That the intended partnership with Smith went off (*a*), of which the co-partnership had notice (*a*), and that they, though requested (*a*), refused to cancel or give back the guarantee (*a*). Issue.

Bovill, *Lush* and *Paterson*, for the plaintiff.

Chambers, *Hawkins* and *Garth*, for the defendant.

The defendant began, and being called in support of his plea, stated that having, in June, 1856, been introduced to Smith, and a partnership being proposed, and both banking with the plaintiff's co-partnership, it was agreed that they should mutually make inquiries there; and accordingly the defendant applied to the plaintiff for information, when the plaintiff made the statements set forth in the declaration. In addition thereto, the plaintiff

(*a*) Not saying *when*, nor whether it was *before* the advances were made, and *vide* the evidence that it was *not*.

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referred to the contracts of Smith, especially to one at Netley, for which the plaintiff said the bank had agreed to advance him 5,000*l.* The defendant found that Smith had eight contracts on hand at Pembroke, Netley, Portsmouth, Shoreham and other places, which the defendant visited, and inspected the works, and where he was satisfied as to the value of the contracts. Soon after his return from this inspection, he saw the plaintiff and informed him of this, and of this disposition to form a partnership. He also saw Smith and inspected his balance sheet, whence it appeared that (as the plaintiff had stated) he was worth 24,000*l.*

On the 7th July, 1856, after all this, the defendant lent Smith 2,000*l.*, taking his promissory note for the amount.

Shortly afterwards the Netley contract was put into defendant's hands to conduct, and he lent Smith 2,000*l.* more.

The defendant continued in charge of the Netley contract until September, 1857, when it was completed.

On the 23rd July, 1856, the defendant saw the plaintiff, who said the bank wanted him to give a guarantee, as otherwise they should stop advances to Smith. Defendant's version of the interview was, that he told plaintiff that the partnership was not formed, and that he asked, if it went off, how the guarantee was to be dealt with? to which the plaintiff replied, "If the partnership does not go on, we will give back the guarantee," and that the defendant on that understanding then gave the guarantee, which was as follows:—

"To the London and County Bank.

"23rd July, 1856.

"In consideration of your advancing to Mr. E. Smith the sum of 5,000*l.* from time to time, as he may require, I hereby guarantee and hold you harmless from any loss

that may arise to you in consequence of such advances, and this shall be to you a continuing guarantee to the extent of 5,000*l.*"

The defendant, as already mentioned, was in charge of the Netley contract until September, 1857, when it was completed.

On the 4th October, 1856, the defendant lent Smith 2,000*l.* more, taking another note.

On the 4th November, 1856, the defendant being at the bank, the plaintiff complained that the partnership was not confirmed, and intimated that Smith's account had increased to 25,000*l.*, that there was another large sum owing, a covered debt of 25,000*l.* According to the defendant's account, this was the first he had heard of the covered debt, as additional to the uncovered debt, and that he told the plaintiff so, who however denied it.

In January, 1857, the defendant employed an attorney to look into the matter.

Further interviews took place between the parties, but the partnership was not confirmed.

On the 21st April, 1857, the plaintiff wrote to the defendant to know when it would be completed, and the defendant replied by a letter to the effect that the valuation of the stock was going on, and would necessarily take a long time, and that the affair could not be hastily concluded.

In September the Netley contract was completed.

On the 6th October, 1857, Smith died, and it turned out that he was insolvent.

Shortly before this the defendant was present at a meeting of the directors, at which the guarantee was alluded to, and the defendant mentioned his impression of the oral agreement with the plaintiff, that if the partnership did not take effect, the guarantee should be given up, which the plaintiff denied.

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On the 6th October, 1857, the defendant wrote to the bank, that he could not take upon himself the sole burden of carrying out Smith's contracts.

In July, 1857, the defendant's attorney required the exact state of the banking account, including loans and ordinary advances, up to the present time, to be shown, with the particulars of all securities, &c. And the plaintiff thereupon furnished the defendant's attorney with a statement of Smith's account.

	£	s.	d.
Balance of current account .	41,998	4	2
Loan account	19,980	15	6
	£61,978	19	8"

Securities were specified, and among others the defendant's guarantee.

On the 6th October Smith died, as already mentioned, the partnership not having been completed.

On the 18th October, 1857, the defendant wrote to the bank to the effect that as the guarantee was to be given up, if the partnership did not take effect, and Smith had died, he demanded that it should be returned.

The bank denied the statement, and declined to give up the guarantee.

It did not appear that the defendant up to this time had complained of the alleged misrepresentation by the plaintiff as to the state of Smith's account.

The bank took proceedings in Chancery for the administration of Smith's estate, and proved for upwards of 60,000*l.*

In May, 1861, they wrote to the defendant to the effect that the result of the administration had not been to reduce the debt to less than 5,000*l.*, and that therefore they must call on the defendant to carry out his guarantee. He refused, and the present action was brought.

The plaintiff was called, and contradicted defendant, both as to the alleged misrepresentation and the alleged undertaking to return the guarantee.

As to the former, he stated that the sum of 18,000*l.* was mentioned merely as the *current* account, apart from the loan or "covered" account.

As to the alleged undertaking to return the guarantee, the plaintiff denied it *in toto*, and stated that on the faith of it advances had been made to Smith far beyond 5,000*l.*

The plaintiff's version of the matter was, that on the 23rd July, 1856, he told the defendant that the directors had already allowed Smith to overdraw largely, and would not allow him to overdraw further without a guarantee, and that on the guarantee being given, he, the plaintiff, told the defendant, that it would be fair that it should rank *after* the amount to which they had already allowed him to overdraw. And the plaintiff said, that on the faith of the guarantee Smith had been allowed to overdraw until the debt on the current account reached 25,000*l.*, of which the defendant had been made aware.

There was no proof that the statement of Smith's affairs had been seen by the defendant, though it had been sent to his attorney.

The defendant was not asked, whether, if he had known the state of Smith's affairs, he would have given the guarantee.

The attorney for the defendant being called, *Bovill*, in cross-examining, asked him when he first heard of the guarantee, whereupon

Chambers asked from *whom* he heard it; and the answer being, that he heard it from his client, the defendant, proposed to ask, "What did he say to you at the time?"

Bovill objected to the question, and

WILLIAMS, J., disallowed it.

The attorney for the plaintiff being called, denied, in

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the course of cross-examination, that the attorney for the defendant had told him at a certain time that his client had complained of misrepresentation, whereupon

Chambers proposed to recal his client's attorney to contradict this.

Bovill objected that it would be collateral, but

WILLIAMS, J., thought otherwise, as it bore upon the main subject of inquiry; the contention on the part of the plaintiff being, that the alleged misrepresentation was a mere afterthought.

The plaintiff admitted that, before June, 1857, the defendant had reproached him with not having given the state of Smith's affairs correctly, but not that he had declared that he had given his guarantee on the *faith* of that statement, and the defendant himself was not asked that question.

WILLIAMS, J. (to the jury).—The defence consists of two parts, and it is for you to say whether either or both, or neither, are made out. As to the first, you will have to say whether either the plaintiff made the alleged misrepresentation as to the state of the banking account, and whether the defendant, by reason of it, was induced to enter into the guarantee. And, upon the second point, consider and state, separately and distinctly, whether there was the alleged undertaking that the guarantee should be returned, in the event of the partnership not taking place.

The evidence of the defendant seems to me to make out the plea in *both* its parts. It is for you whether you can rely upon it. And, if you believe the plaintiff, the plea is disproved.

Nothing is said by the defendant as to the alleged misrepresentation until the conversation with the plaintiff, shortly before the interview with him before the directors, when he reproached him with it; and even then he does

not appear to have said that he had given the guarantee on the *faith* of the plaintiff's statement. And, in answer to the letter of the directors after Smith's death, the defendant makes no mention of the alleged misrepresentation. The defendant's attorney was recalled to prove some previous complaints about it, but they were quite general, and do not appear to have amounted to what is now set up, viz., that the defendant was induced to enter into the contract by the misrepresentation of the plaintiff.

You must say—

1st. Whether there was the misrepresentation alleged by the defendant, and whether he was by reason of it induced to give the guarantee.

2nd. Whether the guarantee was given on condition to be returned, if the partnership went off.

During the absence of the jury, the learned Judge said: "Supposing the jury find that there was *not* the *misrepresentation*, but that there *was* the *condition*, I shall reserve the point whether the plea is proved or whether it is a bad plea (*a*), because I doubt if it is good. It is a double plea, and the inclination of my mind is that, if the latter part of it stood alone, it would be bad. So that, if the jury find that *latter* part alone for the defendant, I shall give the plaintiff leave to move to enter the verdict (*b*). I have grave doubts whether the plea would disclose a good defence on equitable grounds, if the former part of it, as to the alleged representation, were struck out or disproved, leaving only the latter part—that it was understood that the guarantee should be returned if the partnership should not take effect. I very much doubt if that would be a good defence whether at law or equity. Indeed, I doubt whether, in this case, there would be any difference between law and equity. In the case of a surety, the only difference between law and

(*a*) And so requiring to be proved *in omnibus*.

(*b*) *Vide Oxenham* v. *Smith*, Exch., Mich. Term, 1861.

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equity is, that an equity may arise where the position of the surety is established, and that a Court of Equity will protect that equity. But I have yet to learn that there is any difference between law and equity, as to terms or effect of a written instrument. Therefore, I have much doubt whether the plea is good without the *first* part of it; so that, if the jury find *that* part disproved, the plaintiff should have leave to move to enter the verdict.

Bovill contended that the plea must be proved *in toto*. He also contended that, in the event of the jury finding for the plaintiff, he was entitled to interest (at the rate mentioned in the statement of Smith's affairs) from the date of the guarantee, and which would amount to 958*l.* And for this purpose he should, if necessary, apply to amend the declaration by increasing the claim from 5,000*l.* to 6,000*l.*

WILLIAMS, J., said he did not see that the plaintiff would be entitled to it, there having been no letter claiming interest; but he would reserve the point if it turned out to be material.

The jury found, 1. That there was no wilful misrepresentation.

2. That the guarantee was not induced by any misrepresentation.

3. That there was not sufficient evidence to show that the guarantee was given conditionally.

In answer to the learned Judge, they said that they meant there was no misrepresentation at all.

Verdict for the plaintiff, 5,000*l.* (*a*).

(*a*) *Chambers* moved in Exchequer but took nothing. *Bovill* did not move, abiding by the opinion of the learned Judge.

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Coram Williams, J.

FRAMPTON AND OTHERS *v.* WILLIAMS.

Summer Assizes.

In ejectment, the evidence showing title on a party not joined:—*Held*, that he could not be joined without his consent, nor could the plaintiffs recover without proof of the transfer of his title to them.

EJECTMENT.

The evidence of title in the plaintiffs was a writ for use and occupation of the premises, issued in their names against the defendant, and on which, having been specially endorsed, he had made a payment of the debt claimed. But, on its being produced, it appeared to be in the names of the plaintiffs and one B., who, it was *stated*, was a mortgagee, who had been paid off since the former action.

It was objected, on the part of the defendant, that the present plaintiffs could not recover as the case stood, and

WILLIAMS, J., was of that opinion.

Hawkins applied to amend, by adding the name of the mortgagee, but

WILLIAMS, J., said this he could not do, assuming that he could do it at all (*a*), without his consent; neither could the present plaintiff recover without proof of reconveyance by him to them.

There was then an application on the part of the plaintiffs to amend by striking his name out of the proceedings; but

WILLIAMS, J., said he could not allow that, in the absence of any written consent on his part; for, perhaps he might *not* have been paid off, there being no legal evidence of payment or of reconveyance.

Hawkins then applied for an adjournment, which

WILLIAMS, J., granted until the next day, when,

A witness was called, who proved the mortgage to B. and reconveyance by him to the other co-plaintiffs.

WILLIAMS, J., held this sufficient, and thereupon directed a

Verdict for the plaintiffs.

(*a*) As to which *vide Blakey* v. *Done*, *ante*, p. 575.

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Croydon, coram Williams, J.

BROWNLOW AND OTHERS *v.* THE METROPOLITAN BOARD OF WORKS AND JOHN AIRD.

Summer Assizes.

Contributory negligence is no answer to an action grounded on negligence unless it was the *proximate* cause of the injury. And in an action against a public body and their contractor, for an injury caused to a vessel by its grounding on piles driven into a river, in the course of works authorized by their act:— *Held*, no answer to the action, that the master of the ship, *not* seeing the piles, steered it over them: —*Held*, also, that as the piles were driven in according to the contract and plans, the board were liable jointly with the contractor, though the latter *might* be separately liable for negligence in not giving notice, &c.

THIS was an action against the Board of Works and their contractor, jointly, for alleged negligence in the course of the execution of certain works on the Thames.

The first count stated that the defendants wrongfully placed, in a certain common navigable river, and highway, viz., the River Thames, certain piles and pieces of timber, and works, and wrongfully kept the same therein, and thereby greatly obstructed the due and proper navigation of the river, by reason whereof the plaintiffs' ship then lawfully navigating the river, ran and struck upon the piles, &c., and was by reason thereof greatly injured, &c.

Second count, that the plaintiffs were lawfully possessed of a ship, then lawfully navigating a certain common public navigable river, and the defendants were constructing certain works in and upon the bed of the river, and in a part of the river along which ships were in the habit of navigating, and had a right to navigate; which said works interfered with the free navigation of the river; of which the defendants had notice.

Averment, that the *defendants* so negligently conducted themselves in the construction of the works, and so carelessly constructed them, without taking due and proper precautions to protect ships passing along the river, and so carelessly omitted to indicate to ships the existence and extent of the works, that by reason thereof the ship of the plaintiffs, while navigating the river, struck upon the works, and was injured, &c.

Pleas (by the *Board of Works*):—1. Not guilty.

2. That the acts, &c., whereof the plaintiffs complain in the two counts *respectively* were done by the defendants,

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under and in pursuance of the powers contained in the 18 & 19 Vict. c. 120, and 21 & 22 Vict.

Averment: that all conditions were performed, which by law were required for the proper execution of the said acts, &c. Issue.

Pleas (the defendant, Aird): 1, not guilty; and also a similar plea to that pleaded by the Board, under the act of parliament. Issue.

Bovill, Lush, and *Hannen,* for the plaintiffs.

Chambers, Denman, and *Raymond* for the Board of Works.

Hawkins and *H. Lloyd* for the defendant Aird.

In 1859 the Board resolved, under the powers of their acts, to make a new outlet for a certain sewer, and carry it out 200 feet into the Thames, by means of an iron pipe, laid in the bed of the stream, protected by wooden piles.

They entered into a contract with the defendant Aird to do the works; he to be responsible for the *protection* of the works, and all needful precautions, in the way of lighting, fencing, and the like.

The act provided that no work, in the bed of the river, below low water-mark, which *might interfere with the navigation* of the river, should be commenced, without the same having been previously approved of by the Commissioners of the Admiralty, which had *not* been obtained; but which, it was alleged by the defendants, was not required in this instance, because (as their case was) the work did *not* "interfere with the navigation" of the river.

One of the defendant's witnesses, however, admitted that it *did,* and so the jury found.

The act also provided that no person should work in or upon the bed or shore of the river ("shore" being defined to mean between high and low water-mark), or to drive any piles therein, or in the river, without the permission of the conservators.

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The plans laid before the conservators by the Board, and approved of, showed that piles were to be driven into the river, and *where;* the Thames conservancy having seen the plan of the works, including the piles, approved thereof, subject to the condition, that the piles should be cut off level with the foreshore.

The defendant Aird proceeded with the works, and in the progress thereof fixed certain piles in the bed of the river, to protect the sewer pipe. After this, the plaintiffs' vessel, a steamer, going down the river, with a barge and spars lashed to her side, was steered over the piles, grounded and settled down on them, and was much damaged thereby.

There was a great contest of evidence as to whether, or how far, the piles came above the water, or how far they were visible.

It was suggested that the *grounding* on the piles was owing to the *negligence* of the master, in sailing over them.

There was no barge, buoy, or other signal to indicate the piles, nor had the master noticed the works.

The case for the plaintiffs was, that, but for the piles, the vessel would have grounded on soft mud, and have gone off with the next tide, without any material injury, but that, as it was, the ship's bottom became fixed, and fastened on the piles, and thus the water went over her, and the serious injuries ensued.

The plaintiffs' witnesses stated that, even if they had known of the piles, they could not have got the vessel off; but she would have swung round on the bank.

There was a contest whether the steamer should have steered *inside* a certain tier of vessels, and also whether the spars had not obstructed the steerage.

To fix the Board (it being proved by their own letters, that the defendant Aird was their contractor) a foreman of Aird's was called, who proved that he had worked for Aird

in driving in the piles, and that they *worked from the contract drawings.*

It appeared that the sewer pipe running out into the river was sunk into the bed of it, between the piles which were on each side of it, and the heads of which were cut off to the level of the ground, on each side of the pipe, and somewhat *above* the pipe.

The working drawings attached to the contract showed that piles were to be driven in.

The acts of parliament allowed this, provided that the piles were cut off level with the foreshore, and above low water-mark.

The act required that piles should not be driven in, unless with the approval of the Thames Conservancy Board, and the plans approved by the Board showed that piles were to be driven in, and *where.*

In the course of the plaintiffs' evidence it was disputed whether the piles had been driven in according to the plans approved of, viz., above low water-mark.

At the close of the case for the plaintiffs—

Chambers, for the Board, objected that there was no case against *them,* it appearing that there was a contract by Aird, the co-defendant, as an independent contractor; *Rapson* v. *Cubitt* (*a*).

They therefore are not liable for *his* negligence, assuming that it is so.

WILLIAMS, J.—That depends on whether the contract was to do *this particular* thing (*b*). Some of the cases show, indeed, that, if there is any negligence *collateral* to the performance of the contract, the employer of the contractor would not be liable. If, however, I order a man

(*a*) 9 M. & W. 710.

(*b*) See *Ruck* v. *Williams,* 27 L. J., Ex. 357, that employers are liable for a want of something necessary, *not* included in the contract and plans.

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to put up a post in the middle of a highway, it is immaterial whether the man does it by contract or not.

Chambers.—But the Board are not bound by the particular manner in which the contractor chose to do the work. All that appears is, that they ordered the work to be done; *i. e., properly* done. For anything *improperly* done, they, therefore, are not liable, unless there is proof order *to do this particular thing.*

WILLIAMS, J.—I have a strong opinion that there is evidence to go to the jury that the Board employed the co-defendant, Aird, by contract, to put down these piles. But I will reserve that and all other points of law which may arise.

[Ultimately it appeared to be admitted that in substance the piles had been *driven* in according to the plans.]

The defendants called evidence to show that the piles were properly cut off, and that the pilot was in fault in the course he had taken.

But it appeared, on cross-examination, that, by the plans submitted to the Thames Conservancy Board, the piles were to be driven in nearer the shore, so that their tops or heads would have been visible even at low water; though it did not appear that they would have been plainly seen from vessels navigating, and the defendants' witnesses said it was usual in cases of sewer works to drive piles into the river, the tops of which were about level with low water-mark. And this appeared to have been the case in this instance.

Witnesses for the defendants gave it as their opinion, that the piles were not an obstruction to the navigation.

The reason they gave for this opinion was, that the heads of the piles, not being above the level of the fore-shore, a vessel drifting over them would not touch them, unless it should have touched the ground. (This, it will be observed, was not disputed on the part of the plaintiffs,

but it was contended that the soft shore could not have injured the vessel as the piles had injured it.)

The witnesses for the defendants gave it as their opinion that the vessel should not have been steered so near the shore, but should have taken a course more towards the centre of the river, the proper navigation being nearer the mid-channel.

WILLIAMS, J.—That appears to me to be immaterial, for the case for the plaintiffs is, that there was a tier of vessels which prevented their steamer from taking a course nearer the mid-channel, so that the abstract question, which is the proper course of navigation, does not really arise. The plaintiffs had a right to navigate any part of the river, and although the master made an indiscreet choice in the course he took, if the defendants have put piles into the bed of the river, which prevented him from using it, as he would have otherwise been able to do, the defendants are answerable, unless they can show that he had *notice* of it. If you put a post up on the highway, it is immaterial whether or not the driver took the proper course, for, unless he knew of the post, you are answerable for the consequences; though if he saw it or knew of it, and drove against it, he would be the author of his own injury. Of course, if a man *sees* a post and drives or rides against it, he cannot complain, but if he does *not* see it, even although he is on the wrong side of the road, or riding at an imprudent pace, and supposing that had nothing to do with his not seeing it. If it appears that the plaintiffs were, through the course taken by their servant, the master, the authors of their own wrong, of course they cannot recover. Some of the defendants' witnesses admitted that piles projecting as these did might be a nuisance to the navigation, and that if done by a stranger, or a private person, for instance, in front of a wharf, it would be complained of as a nuisance. There

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was evidence that the driving in of the piles was a process which must have been heard and seen by masters of vessels going up and down the river.

At the close of the evidence,

WILLIAMS, J., said:—The construction of the contract and the statutes of course will be reserved for the Court.

Upon the statutes, however, some questions of fact arise, on the one side and the other.

For the defendants it is contended, that even though there were no act of parliament authorizing these works the plaintiffs could not recover, because their servant, the master, or pilot, by the course he took, contributed to or caused the injury.

But as to that I have already declared my opinion, that negligence in the master is no answer, unless it contributed to cause the injury; and here I think, that on the evidence, it did *not* do so. Nevertheless that is a question of fact, on which I will take the opinion of the jury.

Then on the other hand, on the part of the plaintiffs it is contended, that even although the act of parliament authorized the works, that does not protect the defendants, because the works were not constructed according to the act, the piles not having been cut off level with the foreshore. That raises another question of fact for the jury.

As regards the point that the Board are not liable, because the work was done by a contractor, as it is now not disputed, that the piles were driven in according to the working drawings and the contract, it makes no difference whether the work was done by Aird as contractor, or as the servant of the Board, because the exact thing they ordered was done. And the only ground on which Aird, the contractor, could be liable, as distinguished from the Board, would be in not having placed some barge or buoy, to mark where the piles were, which will cause another question of fact.

There is also the question, under the statute, whether

the works interfered with the navigation, which will raise a question of fact for the jury.

On the part of the defendants jointly it was contended, that they were not liable, as the Board had acted under the authority of the acts of parliament, on plans approved by the Thames Conservancy Board. And on the part of the Board it was contended, that they at all events were not liable. But, at the close of the case, it did not appear to be disputed that the piles had been driven in at the place shown by the plans, sanctioned by the Board, though it was still contended by the plaintiff, that the pile heads ought to have been cut off, and by the Board, that for *that* they were not responsible.

At the close of the case

WILLIAMS, J. (to the jury).—The rule, that a person who contributes to his own injury by negligence cannot recover, has no application here, because the negligence in this case was not the proximate cause of the injury. If the master had *known* of the piles, the doctrine would have applied. It is not enough to say that if he had not steered the vessel there, it would not have grounded on the piles (*a*).

Still, I will leave the question to you, Was the pilot guilty of want of ordinary skill or care in taking the course he did?

You have also to consider whether the piles interfered with the navigation of the river, navigation not meaning merely the going up and down the river, but sailing in *security*, so that any one who interferes with the *security* of the navigation, interferes with the navigation. And this case is an illustration of that principle; for if the pilot might have grounded the vessel with safety but for the piles, they would interfere with the navigation, because they interfered with its *security* and *safety*.

I shall likewise leave to you the question whether there

(*a*) *Smith* v. *Voss*, 26 L. J., Ex. 233.

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was any neglect of duty in not putting up some buoy or signal to mark where the piles were, but I think that immaterial, because the pilot, according to the plaintiffs' evidence, could not have altered his course, as he was powerless to do so, even if he had known of the piles.

Still it may be better for you to answer, as a matter of fact, whether you think there was any duty on the defendants to give notice of the piles in some way. There *is* evidence that the conservators were used to give such notices, and I think there is no evidence of duty in the defendants to do so.

You have further to consider whether the piles were driven in above or below low water-mark, with reference to the plans as approved of, which show that they were to be *below*.

There are, therefore, four questions of fact for you :—

1. Whether the master contributed to the accident by taking the inside instead of the outside course. (To this the jury answered, No.)

2. Did the works interfere with the navigation? (Answer. Yes.)

3. Were the pile-heads cut off level with the foreshore? (Answer. They projected from the shore at one end.)

4. Were they driven above or below high water-mark? (Answer. Three above, one below.)

5. Was there negligence in not giving notice of the piles? (Jury said, We think that precautionary measures ought to have been taken, but there was no evidence by *whom*.)

WILLIAMS, J.—That last finding amounts to this, that they find no negligence in fact, on *that head*, on the part of the defendants. It will be matter of law on whom the duty lies.

Verdict for the plaintiffs (*a*).

(*a*) It was agreed that damages should be referred. In M. T. *Chambers* got a rule in C. P. on the points reserved.

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Court of Queen's Bench, Westminster, coram Cockburn, C.J.

NELSON AND ANOTHER *v.* SPOONER AND OTHERS.

Michaelmas Term.

In an action by architects whose plans, after having been accepted are rejected, on the ground that the work cannot be done for the amount of their estimates, it is for the jury whether it is an express or implied condition of the contract, that the estimates shall be reasonably near the actual cost.

THE declaration stated, that, in consideration that the plaintiffs, architects and surveyors, *had*, at the request of the defendants, made certain drawings, plans, and estimates, for the building of certain schools, and that the plaintiffs *would*, at the request of the defendants, make certain alterations in the plans, and make the necessary specifications, and advertise for tenders for the erection of such buildings, and would superintend the erection thereof for a certain reward, to be paid by the defendants in that behalf, *i. e.*, five per cent. on the cost of the said buildings, —the defendants promised the plaintiffs to retain and employ the plaintiffs in such capacity, and upon the terms aforesaid.

Averment, that the plaintiffs duly, and in pursuance of the premises, made such alterations, &c., and made such specifications, and advertised for and procured tenders, &c., and were ready and willing to superintend the erection of the buildings.

General averment. Breach, that the defendants dismissed the plaintiffs from the said service, and refused longer to employ them in the same, or to allow them to superintend the erection of the said buildings, and whereby the plaintiff lost the said reward, &c. Common counts for work done, &c.

Pleas: 1. That the defendants did not promise.

2. (To the first count). That the promise was made subject to a certain condition then agreed upon between the plaintiffs and the defendants, *i. e.*, a condition that if the said buildings could not be erected in accordance with the said alterations, for the price at which the plaintiffs had stated in their said estimate, that the said promise should be void. Averment, that the said buildings, in

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accordance with the said alterations could not be erected for the price which the plaintiffs had stated in their estimate, and could only be erected for a much larger price, of which the plaintiffs, before the alleged breaches, had notice.

3. Payment into Court of 1*l.* 10*s.* Issue.

Shee, Serjt., and *Dowdeswell* for the plaintiffs.

Pigott, Serjt., and *Quain* for the defendants.

The particulars claimed 104*l.* 6*s.* 6*d.* for the plans and estimates, prepared in July, 1860, for the buildings in question.

In March, 1860, a committee being formed for the building of the schools, of which committee one of the defendants was honorary secretary and the others were members, the secretary invited the plaintiffs to send plans *and estimates of cost.* The letter ran thus:—

"They will require accommodation for 100 boys and 150 girls and infants, with a proper class-room for boys and two class-rooms for girls and infants. As it is the wish of the committee to introduce the industrial element into the schools, the plans for the girls' school should embrace a laundry and drying-room, together with a small kitchen and bakehouse, and those for the boys a carpenter's shop. Estimates might be added for a proper gymnaste apparatus, in the play-ground, and also for a bath-room. The boys and girls school-rooms should be so planned as to be capable of being thrown into one, and available for public meetings. While the committee are desirous of having good substantial buildings, of tasteful and pleasing exterior, they feel it their duty to avoid any unnecessary expense in architectural ornament."

A plan of the ground was enclosed, whence it appeared that the site for the schools lay between the vicarage gardens and the vicarage meadows, and premises of a Mr. Cook.

The plaintiffs were informed that the plans would have to be approved by the Education Committee of Privy Council, in order to obtain a grant in aid of the building.

On the 25th May, 1860, the committee resolved to erect a wall to separate the vicarage gardens from the school site, and also from the premises of Mr. Cook.

On the 2nd June, 1860, the plaintiffs sent plans, &c. to defendants, with a letter, called the particulars or report, stating that there were benches and desks, and warming and ventilating apparatus, and bath-rooms, and that the cost of the buildings, including the master's and mistress's residences, and the boundary fences, was estimated at 1,485*l.*, and the cost of the bath-rooms to 50*l.* The details of the estimate were—

	£
Schools	750
Boundary fences	250
Residences	485
Bath-rooms, &c.	60
	£1,545

The plaintiffs' estimate, therefore, for the *whole* was 1,545*l.*

On receiving the above estimate, the defendants wrote to the plaintiffs to inquire whether it included the laying out of the gardens, and gravelling the play-grounds, and likewise asked to be informed of the latest works executed from the plaintiffs' designs—with the *amount of their estimate*, and *the actual cost* of completing the work in each case. To this the plaintiff replied, that their estimate *did* include the laying out of the gardens, and the gravelling of the play-grounds, and he added "There is no instance of any building erected under my superintendence, where contracts have been exceeded unless additions or alteration have been authorized by the parties themselves. This is the plan we invariably follow, and it is the best security against a building costing more than it was originally intended to do."

On the 6th June one of the plaintiffs, Innes, attended

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a meeting of the sub-committee, when he was asked if the buildings could be carried out for the amount of his estimate. He and the members of the committee present did not agree as to the answer; his version of which was that he believed they could. He was then told of certain alterations required, as to the position of the industrial schools, and the substitution of a wall for a fence, (as provided in the estimate,) next to the vicarage gardens. The plaintiff, Innes, said these alterations could be effected for an additional expense of 60*l.*

On the 7th June, the plaintiff Innes attended another meeting of the committee, at which one or two other alterations were suggested, and he was asked whether they could be carried out within the estimate. There was here again a contradiction in the evidence; but on the one hand it was sworn that the plaintiff Innes said that they *could*, and on the other hand he did not say that he had stated that they could *not;* and the effect of the evidence appeared to be that he said he thought they could or might be, and that, at all events, they were led to believe that such was his statement.

The plaintiffs were told by the defendants that they resolved to carry out his plans, with the above alterations, and he was asked his charge, to which he answered that it was the usual rate of five per cent. commission.

The minute made by the committee was (*a*), Mr. Innes was in attendance to receive the suggestions of the committee. Several important modifications were proposed by the committee, and adopted by Mr. Innes. It appeared that the whole cost of executing the plans, excluding architect's charges, would be *about* 1,545*l.*

(*a*) BLACKBURN, J., had made an order in the present action, that the plaintiffs should be allowed to inspect and take copies of the minutes of the meetings of the committee, of which the defendants are members, and the entries in the minute-book, so far as they relate to the plaintiffs and the matters in difference in this action.

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As the committee could not yet count on more than 1,350*l.*, a question arose whether they should adopt the course of omitting for the present the teachers' residences.

It was resolved to accept Mr. Innes's plans, with certain modifications, and to proceed at once to [make the necessary inquiries, as to practicability and desirableness] of carrying them into execution. (It was suggested for the plaintiff, that for the words in brackets, should be read "to obtain tenders from builders, for the purpose of carrying them into execution," the words being written on an erasure.)

Mr. Innes again met the committee, when the chairman informed him of the adoption of his plans, and requested him to make copies, and prepare the detailed specifications.

On the 26th June, the plaintiff Innes took out the quantities.

On the 27th June he prepared an advertisement for tenders, stating that the plans and quantities could be seen at the plaintiffs' offices.

On the 11th July the defendants wrote to the plaintiffs, informing them that the lowest tender was 2,056*l.*

On the 12th July, the defendants informed the plaintiff Innes that they had determined not to accept any of the tenders, and not to carry out his plans. The plaintiff Innes said that the estimates could be reduced, but this was refused.

There were eleven tenders, of which the average was 2,321*l.*, and the committee resolved, that the lowest builder's estimate was so greatly in excess of that of Mr. Innes, that they entirely abandoned his plans. Of this the plaintiffs were informed.

On the 23rd July the plaintiffs wrote to the committee in these terms:—

"In looking through the plans and specifications, we think that several reductions may be made, and we suggest

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that the quantities be revised. No estimate was made of the plans prepared by direction of the committee, and we are still of opinion that the building may be erected according to the original design, for about the sum we estimated.

The plaintiffs applied for compensation and were refused.

In December, 1860, this action was brought.

There was contradictory evidence, as to whether the buildings, as designed by the plaintiffs, with the alterations assented to, could have been executed for the estimated sum, and whether the excess arose from *additions*, not within the revised plans' estimate.

On the part of the plaintiffs, evidence was given to show that these additions would have cost 250*l.*

On the part of the defendants, evidence was given to show that the cost of alterations was counterbalanced by some savings.

Six witnesses for the defendants swore that it was put to the plaintiff Innes, whether the alterations would increase the expenses, and that he said they would *not*.

COCKBURN, C. J. (to the jury).—There are these questions for you:—

1. Whether it was an express condition that the works shown in the revised plan should be capable of being executed for the estimated sum? If not, then,

2. Whether there is an *implied* condition in such cases, that the work shall be capable of being done for a sum reasonably near to the estimated sum? If so, then,

3. Do you think that the plaintiff's estimate was so reasonably sufficient, as that the defendants ought to have employed him?

4. As to the common counts, it is for you to consider

whether the labour bestowed on the plans, &c., was not bestowed under the special contract.

The jury could not agree, and eventually

Jury discharged (*a*).

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(*a*) See, as to conditions implied from the nature of an employment, *Hays* v. *Tindall*, *ante*, p. 88, and see, as to architects' contracts, *Moffatt* v. *Lawson*, 24 L. J., C. P. 56.

Coram Cockburn, C. J.

PYM *v.* THE GREAT NORTHERN RAILWAY COMPANY.

Trinity Term.

THIS was an action by the administratrix of Francis Pym, deceased. The declaration stated that the defendants were carriers of passengers upon a railway, for reward to them, and the said Francis Pym was received by them as a passenger, to be by them, as such carriers, safely and securely carried upon the said railway, on a journey from, &c., for reward. Yet the defendants so negligently conducted themselves in that behalf, and kept their said railway in such an unsafe and improper state and condition, that, by reason thereof, the said Francis Pym, while proceeding on his said journey, was seriously wounded and injured, and afterwards, and within twelve calendar months next before the suit, died of the wounds and injuries so received by him as aforesaid. And the plaintiff as administratrix, for the benefit of herself, as the widow of the said F. Pym, and also for the benefit of (naming eight) children of the said F. Pym, sues according to the form of the statute.

Plea: not guilty.

In an action against a railway company for an injury to a passenger, it is evidence of negligence in the conduct of the carrying, that the train was run over a rail known to have been defective and fractured, the jury considering that this was the cause of the accident.

In the case of an injury causing the death of the father of a young family with an ample estate, the question of *fact* for the jury as to damage under Lord Campbell's Act, is, whether he might be reasonably expected to have advanced monies out of his estate for their education and advancement in life.

Quære, as to the *law* on such a case.

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THE GREAT NORTHERN RAILWAY COMPANY.

Bovill, *Lush*, and *Garth*, for the plaintiff.

Hawkins, *Couch*, and *Holl*, for the defendants.

On the 23rd April, 1860, Mr. Pym, the deceased, was a passenger by the railway; and, when the train was passing through the Hatfield station, through a siding on the down side, the train went off the line at a spot where a rail was under repair, on account of some defect in it; and from that cause the injuries ensued, of which he had died.

The rail was seen to break as the engine went over it, and the carriages then went off the line in different directions, and it appeared that the deceased had been thrown violently out of the one in which he was.

The negligence relied on by the plaintiff was, that the rail was in such a damaged state, through wear and tear, that it was dangerous to allow it to remain on the line.

And, in support of this case, scientific witnesses were called, who said that, when a rail was in such a state, the permanent way could not be considered as in good and proper working order, nor safe for the high speed at which the train in question was going.

In addition to this, the rail had been "turned" two or three months before; and the evidence showed that it was damaged even *then*. And it was proved that there was a *crack* in it at that time, notwithstanding which, it was left to a mere foreman of plate layers to decide that it should be turned, as it accordingly was, without any report or inspection by a superior officer.

The engineer of the Company could not explain why the rail broke; but thought it was on account of the flaw or crack, which appeared in the rail. His opinion was, that the fractured rail was safe but for the flaw, and that the flaw had taken place *since* the turning.

Mr. Bidder, the eminent engineer, however, gave strong evidence on behalf of the Company to negative the alleged negligence, and to the effect that the rail was fit to be turned, and that the fracture had occurred *since*.

The main question, however, was as to *damage*.

The deceased was possessed of an estate in fee to the value of about 4,000*l*. a year. He was forty-one years of age. There was a jointure of 1,000*l*. a year settled on his wife, and the whole 4,000*l*. a year went to his eldest son, who was ten years of age. There was a sum of 20,000*l*. settled on the younger children, giving them 100*l*. a year each. The ages of the children varied from ten years to two months. There was, besides, personalty to the amount of 3,000*l*.

It was objected, on the part of the defendants, that there was no evidence of legal damage under the statute.

That point, as a question of law, was reserved.

COCKBURN, C. J. (to the jury).—Railway Companies are not *insurers* of their passengers' lives. They are only bound to use the care and caution which may be reasonably expected by reasonable men.

If you should be of opinion that the accident was owing to the fracture of the rail, *and that the use of the rail was negligence on the part of the Company*, the plaintiff is entitled to your verdict, provided it is established that the plaintiff and her children, or any of them, have sustained *pecuniary loss* by the death of the deceased. No loss *not* pecuniary can be considered in such a case.

The loss of a father's care and advice cannot be replaced; but you cannot give compensation in respect of it, nor to the widow, for the loss of her husband's society and affection for the rest of her life. The *eldest* son is out of the question; for, so far as *pecuniary* considerations are concerned, he is a *gainer* by the death of his father. As regards the others, the widow having 1,000*l*. a year and the children their shares in the interest of 20,000*l*. (at the

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rate of four per cent.), that gives 1,800*l.* a year; deducting which from 3,870*l.* (the exact amount of the father's income), it leaves 2,070*l.* a year, which *primâ facie* is the pecuniary loss the family have sustained; because, instead of the sum of 3,870*l.* being divided among the family or expended for their benefit, the whole goes to the eldest son, and accumulates for him.

But, of course, it cannot be taken that the 2,070*l.* a year is all a dead loss to the widow and her children, because the deceased would, doubtless, have expended a portion of it on himself.

On the other hand, it is fair to consider that he would not have expended the whole difference upon himself, but would have taken care that his children should have the benefit of a first-rate education, and some proper provision.

You will say, therefore, whether you are led to the conclusion that a certain portion of his income, beyond the 1,800*l.* a year (which the widow and children would have after his death) would be laid aside for the benefit of his family, or *applied* for their benefit and advancement in life. And if you think the Company liable in this action, and that the family have sustained pecuniary damage in that respect, you will estimate the amount.

You will bear in mind, as to the personalty, to the amount of 3,000*l.*, the widow will get her third, and all the children their shares of the residue. It is fair to suppose that, if the father had lived, he would have made provision for his *younger* children out of this fund.

The real question for you is, whether you think that when the father of a family, having an ample estate, is cut off in the prime of life, that his widow and children—in this case, especially the *children*—have not sustained a substantial pecuniary loss by the cessation of the income which they would otherwise have enjoyed?

It is not a mere question of what he would have *given*

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them; but whether he would not have *expended* upon them in their education and advancement in life considerable sums of money out of his income, and which they will now lose? If so, that would, I think, be a pecuniary loss within the statute.

Verdict for the plaintiff, 13,000*l.* (*a*).

(*a*) 1,000*l.* for the widow, and 1,500*l.* for each child. The Court of Queen's Bench refused a rule on the question of negligence, the Lord Chief Justice reporting that the verdict was satisfactory. The Court, however, granted a rule on the point reserved, as to whether there was pecuniary damage within the statute.

The case is reported, although thus pending on that question, partly because of the opinion of the Court as to the evidence of negligence, partly because it appeared to be admitted that the ruling of the Lord Chief Justice was correct, as to the question of *fact* to be left to the jury as to damage, (assuming that there could be legal damage in such a case;) and partly that the profession may have early and correct information as to the facts on which the important question of law has arisen.

Court of Common Pleas, Westminster, coram Byles, J.

MAITLAND *v.* BRAMWELL.

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A letter by defendant, a subscriber to a charity, to the committee, impugning the moral conduct of the secretary, in reference especially to a person whom the defendant had recommended as a matron; and a second letter to the committee in answer to an answer from them proposing an inquiry; and certain oral statements made before the committee during the inquiry:—*Held*, privileged if made in the *honest* and *reasonable* belief that the charges were true, even although it appeared that they were made on hearsay.

LIBEL. The declaration stated that the plaintiff was the secretary of the Sleaford Convalescent Society, and that the defendant wrote and published of and concerning the plaintiff and in relation to him as secretary of the said Society, a letter to the committee of the Society, stating that it was to be feared the plaintiff was not acting as he should do by the young women who came to the office; that, by his own admission, he thought no sin of the

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charge brought against him by one Ada B——, who unfortunately went wrong * * * telling her to come to the office after office hours * * *. And that he had also endeavoured to act in an improper way with Mrs. J——, which she told me before it was mentioned to the committee.

Innuendo, that the plaintiff misbehaved himself in his office of secretary, and had been guilty of immoral and indecent conduct towards young women visiting the office of the Society, and debauched one Ada B——, and endeavoured to debauch Mrs. J——, and was an immoral and indecent person.

Second count, setting forth a similar letter to one Dr. Wright (one of the members of the committee of the Sleaford Hospital):—"It was with deep pain I made the statement I did to the committee of the Sleaford Hospital; for the facts that have *come to my knowledge* relative to Mr. Maitland's conduct to those who have sought his protection, points out that he is secretary, the words 'for the *protection* of women,' &c. should be removed; even his own expression to me, in Mrs. J——'s presence, would confirm it; as, in speaking of poor Ada, he said, not that he minded the thing," &c. Innuendo similar.

Third count for slander: "He has kept Ada B—— as his mistress. He led the girl astray, when pursuing a reformed life."

Fourth count, also, for slander, in stating that the plaintiff had procured bills and accounts with intent to injure Mrs. B——, the mother of Ada.

Fifth count for slander, by the defendant, in saying that she had seen the plaintiff and made these charges, and that he had replied in evasive and unscrupulous terms.

Sixth count for slander, in saying, "If a jury should find him guiltless, I should still believe what the girls have stated."

Plea: not guilty.

Parry, Serjt., and *Joyce* for the plaintiff.

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Lush and *Mathews* for the defendant.

The plaintiff was secretary of the Royal Benevolent Society for the Protection of Women and Children, and the Sleaford Hospital, for the reception and reformation of unfortunate women.

The defendant was lady superintendent of the Christian Young Women's Society, and a subscriber to the hospital, and had also promoted subscriptions to its funds.

In August, 1860, Mrs. B——, the mother of Ada B——, mentioned in the libels, was residing with the defendant, at the house of the last-named Society, and was recommended by her to the plaintiff as matron of the Sleaford Hospital, in which capacity she was forthwith engaged.

At that time there was residing at the young women's home the Mrs. J——, mentioned in the libels, who was also a daughter of Mrs. B——.

In June, 1861, the plaintiff made complaints of the accounts of Mrs. B——, as matron.

In August, 1861, Ada B——, the other daughter of Mrs. B——, was at the hospital, and the plaintiff got her a situation at the Crystal Palace.

In September, 1861, Ada B—— had left the situation, and was again with her sister Mrs. J——, at Sleaford.

On the 20th September the plaintiff heard that Mrs. J—— had accused him of improper conduct to Ada B——, and he went to the defendant and denied it.

On the 27th September the plaintiff made formal complaint to the committee of the accounts of Mrs. B——, the matron. At this time the defendant wrote the letter to the committee which formed the first libel.

On the 30th September the charges against her were gone into before the committee.

The result was her dismissal.

At the same meeting of the committee, a sub-committee (comprising the Dr. Wright mentioned in the de-

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claration) was appointed to consider the defendant's letter to the committee.

The "admissions," alluded to by the defendant in the libels, were in the conversation which she had with the plaintiff on the subject of the charges.

The sub-committee wrote to the defendant desiring to see her on the subject, and, in answer, she wrote the letter which formed the libel in the second count.

An interview then took place between the sub-committee and the defendant, at which the slanders alleged in the other counts were uttered, in answer to inquiries or observations made by various members, and in the course of the discussion and investigation which ensued.

On this occasion the defendant said, that Mrs. J—— had made certain statements to her.

The plaintiff, being called and cross-examined as to the charges, was asked, in re-examination, whether there was any truth in any of the charges, which he denied.

Lush proposed to put in the minutes of the meeting of the committee; but

BYLES, J., held them inadmissible.

Dr. Wright, the person to whom the second libel was addressed, was called for the plaintiff, and proved what took place before the sub-committee. It appeared that the defendant had taken her statement from Mrs. B——, and that she believed them to be true. Before the committee she declared that she had "every confidence" in her. There was no evidence that the defendant had any reason to doubt the truth of the statements when she made them, except that, when asked by the committee whether she had any evidence of the truth of her statements she said she had not, further than the statements of Mrs. B——, which she was aware had been derived from her daughter, Ada B——, who, it appeared, was a girl of loose character. The defendant had likewise told the committee that she placed great confidence in Mrs. J——.

Lush, for the defendant, contended that her communications were privileged, although founded on hearsay; the conduct of the plaintiff, as an officer of these charities, being a matter of public interest; or, at all events, to the members of the committee, to whom alone she had made the communications (*a*).

The defendant was called, and was asked as to statements made by Ada B——.

Parry, Serjt., objected; but,

BYLES, J., admitted the evidence.

It appeared that the defendant had been told by Ada that she had been with the plaintiff, and that she had slept out more than once while at the Young Women's Home, saying she had been with friends. The defendant stated that she had gone to the plaintiff and expressed her fears about the girl, and then it was that the expressions which the defendant alluded to in her letters as indicating indifference, or implying an admission of the charges, were made use of.

The defendant also swore that Mrs. J—— had told her Ada had said that the plaintiff had led her astray, and that Mrs. J—— said also, the plaintiff had taken liberties with herself.

It appeared that the plaintiff had first introduced the girls to the defendant.

Mrs. J—— and Mrs. B—— were called for the defendant, and confirmed her evidence.

Ada B—— was likewise called for the defendant; but

Parry, Serjt., declined to examine her as to the charges concerning her.

Lush, in summing up, contended that the sole question was, whether the defendant, at the time she made the statements, believed them to be true.

(*a*) *Vide Turnbull* v. *Bird*, *ante*, p. 508.

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Parry, Serjt., in reply contended that the defendant had recklessly made herself the vehicle of false and malicious charges trumped up by Mrs. B—— in revenge for her dismissal, and that the defendant ought reasonably to have seen that there really was no credible evidence in support of the charges she had chosen to make.

BYLES, J. (to the jury).—If the defendant and the committee had an interest in the matter, she was privileged in making the communications to them. The committee of course were interested, and, if she either subscribed or got any one to subscribe, then *she* was interested. If you think that she stepped forward herself to vindicate the character of Mrs. B—— as a servant whom she had recommended, then her communication was privileged.

The question then is, whether she *reasonably* (*a*) believed in the truth of her statements, and whether she made them *honestly?*

The *truth* of the charges is not now in issue (as there is no plea of justification), although as the plaintiff was cross-examined about them, I allowed him to deny them.

You have not to inquire whether the charges were true; but whether the defendant when she made them reasonably and honestly *believed* them to be so?

As regards the second letter, it was in answer to the committee.

As regards the oral statements, they were in the course of the investigation before the committee.

If the defendant spoke maliciously, and desiring to injure the plaintiff, then she would *not* be privileged.

But if her motive was pure and honest, and merely to promote the interests of the hospital to which she subscribed, or vindicate the character of a servant whom she had recommended, then she was privileged.

Verdict for the plaintiff, 5*l.* (*b*).

(*a*) *Vide ante*, p. 524, n. (*a*).

(*b*) See a very similar case on the Home Circuit, *Humphrey* v. *Stilwell*, *ante*, p. 590. See also *Tidman* v. *Ainslie*, 10 Ex. 64, and *George* v. *Goddard*, *post*.

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Coram Erle, C. J.

WATKINS *v.* REDDIN.

An action maintained by a person who had sustained an injury through his horses being frightened by a traction steam engine used on a highway, under 24 & 25 Vict. c. 70, the jury finding that the engine was likely to frighten horses, and that the defendant *knew* it.

[But *semble*, that the *scienter* was not material.]

DECLARATION, that the defendant was possessed of a steam traction or locomotive engine, and had long used the same for the purpose of drawing trucks and carriages in and along the public streets and highways; and the said engine, when so used, had been and was accustomed, by the noise caused thereby, and by the unsightly and unusual appearance thereof, to frighten horses lawfully driven in and along the said streets and highways [as the defendant well knew]. Yet the defendant wrongfully and negligently used the said engine in a public street or highway, for the purpose of drawing trucks and carriages in and along the same, in the manner aforesaid, and as he had been used to do as aforesaid [without taking any care or precautions to prevent the same from so frightening horses as aforesaid]; and by reason of the premises, the horses the plaintiff was driving in and along the said street or highway were frightened by the noise caused by the said engine, and by the unsightly and unusual appearance thereof as aforesaid, and the plaintiff was thereby injured, &c.

Pleas: 1. Not guilty.

2. That the engine was *not* accustomed by the means and for the cause alleged to frighten horses, as alleged.

3. That the defendant did *not* know the premises as alleged.

Lush and *Joseph Brown* for the plaintiff.

Pigott, Serjt., and *Prentice* for the defendant.

The defendant carried on the business of a contractor, and was the owner of an engine called "Bray's Traction Engine," used for drawing heavily-laden trucks and carriages along the public highway.

The plaintiff was the driver of a Highgate omnibus, the horses of which, while the plaintiff was driving, became

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frightened by the noise, smoke, and appearance of the defendant's engine as it passed on the Hampstead Road; in consequence of which the plaintiff was thrown, and suffered severe injury.

The defendant was using the engine for the purpose of removing a large quantity of earth, in the execution of a contract he had entered into with the New River Company.

The defendant relied on the 24 & 25 Vict. c. 70,—"An Act for regulating the use of Locomotives on Roads," and the tolls to be levied on such locomotives, &c.; which recites, "That the use of locomotives is likely to become common on turnpike and other roads:" and that the turnpike and highway acts do not contain any provision for regulating the use of locomotives on the roads to which they respectively apply, &c., and then proceeds to provide "as to the size and weight of locomotives." Sect. 3. "Every locomotive propelled by steam, or any other than animal power * * * drawing any waggon or carriages shall have the tire of the wheels thereof not less than nine inches in width, but no locomotive shall exceed seven feet in width or twelve tons in weight * * * and the owner of any locomotive used contrary to the foregoing provision shall, for every such offence, forfeit 5*l.*, provided that, whereas it may be desirable that locomotives of a greater width than seven feet, and of a greater weight than twelve tons, should be allowed to be used under certain circumstances. Any person desiring to use any such locomotive on any street or highway within the limits of the metropolis, as defined by 18 & 19 Vict. (the Local Management Act), shall apply to the Lord Mayor * * * or other person having the charge of any such street, &c., who shall have power to authorize such locomotive to be used."

By sect. 5, there is a power to the Secretary of State to prohibit the use of locomotives destructive to highways, or dangerous to the public.

By sect. 8, locomotives propelled by steam are to consume their own smoke.

By sect. 9, no locomotive must be used without at least *two* persons to drive and conduct it.

By sect. 11, no locomotive is to be driven along any turnpike or public highway at a greater speed than ten miles an hour; and any person acting contrary hereto is to forfeit a penalty.

By sect. 13, nothing in the act contained shall authorize any person to use upon a highway a locomotive engine which shall be so constructed or used as to cause a public or private nuisance; and every person so using such engine shall, notwithstanding this act, be liable to an indictment, or action, as the case may be, for such uses where, but for the passing of the act, such indictment or action could be maintained.

The accident occurred on the 19th June.

The engine had been used more than a month previously; and without any accident, otherwise than by frightening horses several times, without actual injury.

It was going at the time at a speed of six miles an hour.

There was evidence that the noise made by the wheels was likely to and had frightened horses of passing vehicles, but no evidence that this could be avoided.

The plaintiff proved that his horses had been before frightened by the engine, though actual injury had not occurred.

Parry, Serjt., submitted that there was no case, as there was no evidence of a *scienter*; and this was material, as the statute authorized the use of the engine.

ERLE, C. J.—If the *scienter* is material, is there not evidence of it? as there is evidence that the horses *were* frightened by the engine; and as the defendant's *men* must have known this, is that not evidence that *he* knew it?

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Lush contended, citing sect. 13 of the statute (*vide ante*), that as the action was grounded on a nuisance at common law, the *scienter* was *not* material.

ERLE, C. J., said he should ask the jury whether the defendant did not know that the use of the engine was dangerous on public roads.

Parry, Serjt., then went to the jury, admitting that care was necessary to prevent injury to the public; and he called witnesses to show that such care was taken by the defendant, and to show that no accident, that is, no *actual injury*, had ever been caused by the engine before. It was not, however, denied that it had been very nearly causing an accident with injury, and had actually frightened horses, and compelled the drivers of vehicles to get down and hold their horses' heads.

The defendant's evidence, however, went to show that this was rather the exception than the rule, and that the majority of horses went by *un*frightened. But the defendant's witnesses admitted, on cross-examination, that they had seen horses shy at the engine.

As regards the care of the engine, it was shown to be under the control of several competent persons acquainted with it, and no carelessness in its management was shown; on the contrary, it appeared that the engine had been repeatedly driven through crowded thoroughfares without accident.

The weight of the engine was ten tons; and it did not appear that any express requisition of the statute had been disregarded.

One witness for the defendant said, "My usual practice is to let off the steam when I see horses timid." He added, however, "I have seen persons hold their horses' heads, or turn out of the road."

Another witness, foreman of engineers of Bray's Traction

Engine Company, proved that the engine had been used three or four years.

The defendant was called, and stated that before he engaged the engine he enquired if it had ever caused an accident, and found that it had not. And that he also enquired as to its safety of construction, and had no reason to believe it dangerous.

This was the only evidence as to the *construction* of the engine.

No evidence was given by the plaintiff to prove that it could have been constructed otherwise, so as to avoid the noise or other alleged causes of danger: nor that by being managed otherwise they could be avoided. Nor that any precautions which might have been taken had *not* been taken.

On the other hand, no evidence other than above mentioned, was given by the defendant to prove that precautions *had* been taken; and the strength of his case seemed to be that though the engines had been used for years, no *injury* had ever been caused by it before.

On the other hand, all his witnesses admitted that they had known horses to shy at it.

The defendant, however, was not expressly proved to have heard or known this, otherwise than as an inference from the knowledge of his servants and the other witnesses. He himself was not asked the question, although he was asked generally whether he knew it to be dangerous, and denied that he did so.

Parry, Serjt., in summing up, relied chiefly on the absence of any evidence of *scienter*, and on the long use of the engine without accident.

Lush, in reply, insisted that the *scienter* was immaterial, and that it was admitted that the engine wa attended with danger, and therefore was a nuisance on the highway. But

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there *is* evidence of the defendant's knowledge of the danger.

ERLE, C. J. (to the jury).—The plaintiff is entitled to your verdict, if the engine was calculated by its noise and appearance to frighten horses, so as to make the use of the highway dangerous to persons riding or driving horses. For the defendant has clearly no right to make a profit at the expense of the security of the public.

Besides this, however, which is the main question, I desire you to find separately (as there is an issue on the *scienter*), whether, before the accident, the defendant *knew* of the danger, supposing you find it to exist. If he knew it from his men, or other persons, it would be sufficient. So, if he knew it from the nature of the engine itself. (The jury found this in the affirmative.)

Verdict for the plaintiff, 87*l.* (*a*).

(*a*) Stay of execution refused. *Company*, 29 L. J., Ex. 247. See *Vaughan* v. *The Taff Vale*

Court of Queen's Bench, Westminster, coram Cockburn, C. J.

Michaelmas Term.

SCOTT *v.* THE QUEEN.

On the trial of a petition of right, setting up an alleged contract on the part of the Crown, the counsel for the Crown held not entitled to cross-examine the suppliant as to a copy of a memorandum signed by him, without giving proper evidence to account for the absence of the original. And a search must be proved in the *proper department*. But the Court will adjourn to enable the Crown to make and prove such a search, under the Petition of Right Act, 23 & 24 Vict. c. 34, s. 7, combined with the C. L. P. Act, 1854, s. 19:—*Held*, also, that the counsel for the Crown, in summing up, might comment on the *whole* of the evidence.

PETITION of Right (*a*).

The declaration stated that Peter Scott, the suppliant by, &c., presented his petition of right to the Queen (setting it forth *in hæc verba*): "The humble petition of P. Scott, of &c., showeth, &c." The petition stated that

(*a*) See Bovill's Act, 24 & 25 Vict. c. 34.

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on the 10th April, 1854, your Majesty's suppliant, by letter, addressed to the Comptroller of the Navy, tendered to deliver, &c., meadow or upland hay at the ports of London, Liverpool, or Dublin, in quantities not exceeding 52 tons weekly, at the price of 6*l.* 10*s.* per ton for meadow hay, and 7*l.* 10*s.* per ton for upland hay, during twelve months from the date of the letter.

That on the 25th April, 1854, J. W. Woodley, one of your Majesty's Deputy Commissary-Generals, *and an agent duly authorized for the purpose,* accepted the said offer of your suppliant, and thereupon a contract was made between the said J. W. Woodley, so authorized as aforesaid, and your suppliant, and that your suppliant should deliver to your Majesty's agent at Liverpool, appointed for the purpose, compressed meadow hay, in quantities not exceeding 50 tons weekly, for and during the period of twelve months from the 10th April, at and for the price of 6*l.* 10*s.* per ton, and that the said agent at Liverpool should receive the hay, and pay for the same on delivery. And the said Woodley thereupon gave orders to your suppliant to commence delivering the hay, according to the contract, at Liverpool, to one F. Bevis, an agent duly authorized to receive the same.

Averment, that suppliant was afterwards ready and willing, and offered, to deliver the hay, according to the contract; but that Woodley, so being such agent as aforesaid, refused to allow the same to be received by the said Bevis, and required that suppliant should substitute a certain portion of compressed upland hay, at the price of 7*l.* 10*s.* per ton, in lieu of a certain similar portion of compressed meadow hay, so agreed upon as aforesaid; that suppliant did so, and that it was then agreed by and between him and Woodley, being such agent as aforesaid, that upland hay should be substituted for meadow hay, and that all the terms and conditions of the contract

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hereinbefore mentioned should apply to the upland hay, and that suppliant should deliver upland hay at Liverpool, in quantities not less than 52 tons weekly, at the price of 7*l.* 10*s.* per ton, for and during the period before agreed upon.

Averment, that afterwards, in January, 1855, while suppliant was ready and willing, and had offered, to supply said upland hay, according to the contract, the said Bevis, *so being such agent as aforesaid, and duly authorized in that behalf*, absolutely refused to receive any more hay from suppliant, although he had done all things necessary to entitle him, &c. That one of the terms of the contract was, that, if necessary, to put an end to the contract before the end of twelve months, reasonable notice should be given.

Averment, that no such notice was given. Allegations of damage.

Plea: that the several statements in the petition are not, nor is any of them, true in fact. Issue.

Lush, *Digby Seymour*, and *Gibbons*, for the suppliant.

Sir *William Atherton*, A.-G., *Collier*, and *West*, for the Crown.

The question was, as to whether the contract was, as stated in the petition, to deliver 50 tons a week *for twelve months*; or *only for* 150 *tons*, to be delivered in weekly quantities of 50 tons.

The petitioner was examined at great length, in support of his version of the transaction.

Woodley, being abroad, had been examined on commission, and his evidence was read in explicit denial of the petitioner's statement of the contract.

The correspondence was voluminous, and the evidence extensive; the trial lasting several days.

On the 10th April, the tender was made, in terms as stated.

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On the 17th April, Mr. Julyan, the Deputy Commissary-General at Manchester, wrote to Scott, the suppliant, and ordered 150 tons of compressed meadow hay, at 6*l.* 10*s.*, *subject to approval* by the military officers at Belfast.

The Board of Officers rejected the hay as being *meadow* hay merely, and not *upland* hay.

The suppliant then went to Manchester and saw Woodley, who then was Deputy Commissary-General there, (in place of Julyan, removed,) and showed a bale of the rejected hay. The contract stated in the petition was said by the suppliant to have been entered into by Woodley, orally, on the occasion of this interview.

The suppliant sent some more *meadow* hay for inspection, but it was rejected as before. Woodley then ordered 100 tons of *upland* hay, at 7*l.* 10*s.*, which was what the suppliant stated as the *substituted* contract. Finally this hay was likewise rejected, and subsequently the suppliant had an interview with Sir Charles Trevelyan (then at the Treasury), who ordered 150 tons of upland hay, as the *suppliant* represented in pursuance of the substituted contract; but according to the case on the part of the Crown, simply, in pursuance of the original contract. Shortly after this the suppliant signed some memorandum, which, on the part of the Crown, it was desired to put in, as containing a statement or settlement of the true contract.

Sir *W. Atherton*, A.-G., cross-examining the suppliant, put into his hands a paper, and asked him if he had not signed such a memorandum, which the suppliant admitted that he had, whereupon (the paper being a *copy* of the memorandum in question) Sir W. Atherton, A.-G. was proceeding to cross-examine the suppliant, as to the contents, when

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Digby Seymour objected that the original should be produced.

Sir *W. Atherton*, A.-G., said he was not prepared to produce the original, as it appeared to have been lost; but he apprehended that, as according to the doctrine of *Slatterie* v. *Pooley* (*a*) he might have proved an admission by the suppliant, as to the terms of any document he had signed, so he might take such admission now in Court, from the suppliant's own mouth.

COCKBURN, C. J.—I doubt whether that can be done without giving some evidence to account for the absence of the original, as it is a document which, from its nature, would be in the custody of the Crown. If it be in existence, clearly the suppliant is entitled to see it. And, if it is *not*, surely it should at least be in some way accounted for.

Digby Seymour also relied on the fact that an order had been made at chambers, that a list of all documents to be put in by either side should be given to the other, and that the document in question was *not* in the list delivered on the part of the Crown; but

COCKBURN, C. J., thought that this, even if it were a ground for an attachment for disobedience of the order, would not preclude the Crown from putting in the document; and, at all events, not so if (as appeared in this case) the document had been discovered after the order and the delivery of the lists under it. But the Crown must give some evidence as to the original.

Sir *William Atherton*, A.-G., then called Bevis, who stated that, to the best of his belief, the document was sent to the Treasury; but that it was not in his custody, when, in 1858, he handed over the papers to his successor under the Admiralty.

(*a*) 6 M. & W. 664.

Mr. Robson, solicitor to the Admiralty, and who had the conduct of the defence, was then called, and stated that he found the paper now produced, (the copy), among the official documents delivered to him; and he *believed* it came from the Victualling Department. He had searched for the original, and had not found it among the *Admiralty* papers.

Digby Seymour contended that this search was not sufficient, not having been made at the *Treasury*, and

COCKBURN, C. J., was inclined to be of that opinion, but intimated that he should not allow justice to be defeated, through mere defect of evidence, and should allow the case to be adjourned to enable the Crown to prove a proper search (*a*).

Digby Seymour thereupon consulted with his client, and admitted the document, which was put in and read.

At the close of the case for the suppliant, Sir *William Atherton*, A.-G., in stating the case for the Crown, was proceeding to notice the evidence as to damage, when

COCKBURN, C. J., intimated that he might safely reserve his observations thereon for his summing up.

Sir *W. Atherton*, A.-G., doubted whether this right would extend to comments on the evidence given for the suppliant, but

COCKBURN, C. J., said it certainly would so far, as was necessary or convenient for the due application of his comments on the case for the Crown (*b*).

(*a*) 23 & 24 Vict. c. 34, s. 7, provides that so far as the same may be applicable, and except so far as may be inconsistent with this act, the laws as to pleading, evidence, hearing, and trial, amendment, the means of procuring and taking evidence, • • • personal actions between subject and subject, and the practice and course of procedure of the said Courts of law for the time being, in reference to such actions shall, unless the Court shall otherwise order, be applicable to such petition of right. And see C. L. P. Act, 1854, s. 19.

(*b*) The words used in the enactment (C. L. P. Act, 1854, s. 18)

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Sir *William Atherton*, A.-G., thereupon assented to the suggestion, and reserved the observations as to damage.

The evidence for the Crown went to negative the alleged contract, and also the authority to make it.

At the close of the case for the Crown,

Collier, for the Crown, summed up on the whole of the evidence.

Digby Seymour, for the suppliant, replied on the whole case.

COCKBURN, C. J. (to the jury).—Was the contract made as the suppliant states, and had Woodley authority to make it? If not, find for the Crown.

Verdict for the Crown.

both as to the party who begins, and the party on the other side, are "sum up *the* evidence," not "*his* evidence." At the same time there are rulings of learned Judges to the effect that the privilege ought not to be abused into a mere *repetition* of what has been said already, and it is not to be presumed that the Lord Chief Justice meant to imply any contrary opinion. See p. 636, as to the nature of the evidence in this case.

Court of Exchequer, Westminster, coram Martin, B.

LIMPUS *v.* THE LONDON GENERAL OMNIBUS COMPANY.

Middlesex Sittings.

In an action against a master for the negligent driving of his servant, it is a defence that the act was *wilful*, in the sense of its being not merely reckless, but done with the design to injure.

THE declaration stated that an omnibus, under the care and control of the defendants' servant, was negligently driven against an omnibus driven by the plaintiff, whereby he was thrown from the same and injured.

Pleas: not guilty, and denying that the defendants' omnibus was being driven by their servant.

Seymour and *Pearce* for the plaintiff.

Hawkins and *Chandos Leigh* for the defendants.

The case for the plaintiff was, that there had been a system of unfair opposition to him on the part of the

Company, by means of "nursing," or unfair following, dodging, crossing and the like; and that in pursuance of this system their driver had on the occasion in question driven recklessly across the road, and so ran his omnibus up against the plaintiff's.

For the defendants their driver was called, and swore that he had driven up against the plaintiff's omnibus *wilfully*.

MARTIN, B.—That is a question which ought hardly to have been asked, without cautioning the witness, as it amounts to a charge of a criminal offence.

Hawkins.—He has been convicted summarily of reckless driving.

Seymour.—Not of *wilful* violence.

The defendants put in their printed rules, issued to their drivers, prohibiting any such driving; and, on the evidence,

Hawkins contended that as the act was wilful, the Company were not liable.

Seymour contended that the rules were colourable; and that the act was not really wilful in such a sense as to exonerate the defendants, though it was so far intentional that it was not *accidental;* for it was in pursuance of the defendants' system, though no doubt rash and reckless.

At the close of the case,

MARTIN, B. (to the jury).—The question is, whether the act of the defendants' driver was wilful and deliberate? If so, the defendants are not liable. But then you must be satisfied that it was so in such a sense, as that, if the plaintiff or any one else had been killed, the defendants' driver would have been guilty of murder.

For so he undoubtedly would have been, assuming the act of driving up against the other omnibus to have been wilful and deliberate, as it has been represented. The mere fact that the defendants' driver was guilty of *mis-*

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conduct, would not exonerate them; and if the driving up against the plaintiff's omnibus was only done *recklessly*, they are liable.

But if it was done designedly, and with the intention of striking against the omnibus and injuring it, then they are *not* liable. If the act was wilful in that sense, find for the defendants; if only reckless, find for the plaintiff.

Verdict for the plaintiff, 25*l*.

Coram Bramwell, B.

Michaelmas Term.

DUNN AND ANOTHER *v.* HALLEN AND ANOTHER.

In an action by attornies for the costs of a defence, which failed, they having been absent on the day of trial, and some of the witnesses consequently not being in Court:—*Held*, that they were entitled to recover, notwithstanding the verdict had passed against their clients, the defendants, unless the jury thought that the absence of the witnesses had caused the loss of the verdict, and so made the plaintiffs' services *wholly* valueless.

ACTION for work, &c., by the plaintiffs, as attornies.

Plea: never indebted, except as to a small sum paid into Court, in respect of a separate bill.

Hawkins and *Karslake* for the plaintiffs.

Collier, *J. J. Powell*, and *Charles Boyle*, for the defendants.

The claim in dispute was a bill of costs to the amount of about 70*l*., in respect of the defence of an action by one Kingston, against the defendants. In that action Kingston had claimed compensation for wages earned in, and also for a wrongful dismissal from, the defendants' service, in the capacity, as he alleged, of accountant, employed at the rate of 2*l*. a week; whereas they contended that he had been engaged only as a clerk at 1*l*. a week. They had paid into Court the amount which would be due for wages at that lower rate, and denied any further liability.

One of the now plaintiffs, Surtees, had the conduct of the business, and had prepared briefs for the defence, instructed and retained counsel in the usual way. The witnesses briefed for the defence were the two defendants, who spoke to the terms of the retainer; and two other

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witnesses, who were to speak as to the nature of the employment, and the value of the services.

The briefs, containing their proofs, however, being put in, it appeared that one of them would have stated that he should have given at the rate of 70*l.* or 80*l.* a year for such services as those which Kingston had rendered.

On the day of trial the cause was entered on a *second* count, and low down on the list, but through other causes going off it was called on suddenly, and neither of the now plaintiffs, nor any of their clerks, were in Court.

The defendants were walking in the outer hall, and only heard by accident that their cause was called on. They went into the Court at once, and were barely in time to have their evidence taken in what they termed a "hurried way." The other two witnesses were not in Court, but it did not appear that they were called outside, and Mr. Serjt. Pigott, the defendants' counsel on that occasion, was now called on the part of the plaintiffs, and stated that he had not intended to call them, and did not believe it would have been for the advantage of the defendants to call them. The jury had found a verdict in favour of Kingston for 25*l.* beyond the sum paid into Court.

Upon this evidence,

BRAMWELL, B., said, although, no doubt, it was, strictly speaking, the duty of the plaintiffs, the attornies, to have been present in Court with their witnesses, yet, under all the circumstances, their absence was a very excusable or venial default, and at any rate they would not be precluded from recovering, unless the jury thought their absence had not only caused the defendants any real damage, but had made the whole of their services in the defence utterly useless and of no value at all; which surely could not be contended.

Collier, however, went to the jury, contending that if

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the plaintiffs had been in Court with the two absent witnesses, the defendants might have got the verdict.

(There had been an order to refer the bill to taxation.)

At the close of the case,

BRAMWELL, B. (to the jury).—The plaintiffs are entitled to recover unless it appears that their services were *wholly useless and valueless*. Can you say so, after the evidence of my Brother Pigott? It rather appears that the evidence of the absent witnesses would have been worse than useless to the defendants.

No doubt it was the duty of the plaintiffs to have been present in Court, either in person or by their clerk, to marshal the witnesses, and answer the questions of counsel. But the question here is, what was the real consequence of their absence, and whether it made all their services valueless? If not, it merely disentitled them to the costs of that day's attendance, to be disallowed on taxation. In that case find for the plaintiffs, subject of course to taxation.

Verdict for the plaintiffs.

Court of Common Pleas, Guildhall, coram Erle, C. J.

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TINDALL *v.* BASKETT.
BASKETT *v.* TINDALL.

In cross actions between vendor and vendee of a ship, the question in both being fraud, in the obtaining a classification as A 1, which had been obtained by trickery on the part of an agent of the vendor:—*Held*, that the jury must, to find against the vendor, believe him to have been a party to this fraud. And letters from the agent to the vendor admitted on his behalf to show his *bona fides*. The cross actions being tried together, and the vendor's called on first, *held* that, on a covenant to pay money, the amount claimed being admitted, and the only plea, fraud, *defendant* was entitled to begin.

THESE were cross actions between vendor and vendee of a ship.

In the first action, by the vendor, the declaration was on a covenant to pay 2,470*l.*, the price of the ship, by

instalments, of which 150*l.* had been paid down, and the residue was to be paid by a certain day elapsed, or when the ship should sail, whichever should first happen.

The particulars, however, (the ship having been repudiated and resold), claimed only a balance of about 950*l.*

Plea: fraud and covin.

In the second action the declaration contained two counts for false representation. The first count set forth that the defendant Tindall, knowing that his ship was not in such a condition as to be entitled, according to the rules of Lloyd's, to be entered and classified, in order to deceive the plaintiff, and induce him to become the purchaser, *caused* it to be falsely and fraudulently represented *to the said society*, that certain repairs required by them, in accordance with their rules, to be done, in order to entitle the ship to be registered and classified, had been done, and thereby falsely and fraudulently *procured the said society* to register and classify the ship under the class known as the best of ships of the second description of the first class, and entered in the registry book as A 1 in red, for seven years, and represented to the plaintiff that the ship was so registered, whereby he became the purchaser, &c.

The *second* count stated that the defendant, in order to induce the plaintiff to purchase the ship, falsely and fraudulently represented to the plaintiff that the ship had undergone a certain amount of repairs then required by the society, and by their surveyor, in order to entitle the ship to be classed as above mentioned, and that the ship was then in a certain state and condition, fit to be so classed; relying on which representation, the plaintiff purchased the ship, whereas, in truth, she was *not* in such state and condition, and had *not* undergone such repairs as the defendant well knew her.

Third count, on a warranty, that the ship had received the required repairs.

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Fourth count, for money had and received.

Pleas: 1. Not guilty, and never indebted.

2. (To the two first counts.) That the defendant had *not* such knowledge of the state of the ship as alleged.

3. That the plaintiff did not become the purchaser, relying on the representation as alleged.

4 & 5. Denying the warranty and breach.

Lush and *Dowdeswell*, for the plaintiff, in the first action, Tindall, the vendor.

Bovill and *Garth* for the defendant in that action, Baskett, the purchaser; plaintiff in the second action.

The first action being entered first, and called on,

Bovill suggested that, as the question in both actions was substantially the same, they should be tried together, to which

Lush assented, and the jury were thereupon sworn in *both* actions.

Bovill then claimed the right to begin in the first action, in which he was for the *defendant*, the only plea being fraud, and the burden of proof upon him.

Lush contended that, as the action was for unliquidated damages, and the amount due was in dispute, he was entitled to begin.

Bovill thereupon declared that he admitted the amount claimed in the particulars, whereupon,

ERLE, C. J., ruled that he should begin.

In March, 1861, Tindall, who occasionally bought and sold ships in London, had the ship in question at Leith, and sent one Thomas, as his agent there, to superintend some repairs, with a view to obtaining a certificate of classification from Lloyd's, as A 1, of the second class. For that purpose it was necessary to have the ship surveyed by Lloyd's surveyor there, and she was so surveyed, and certain repairs directed by the surveyor, which were pro-

ceeded with. He directed that the ship should be "hung" (*i. e.* held up, so as to show the state of her bottom), and re-trenailed and re-caulked. Having to leave Leith for a few days, while the repairs were going on, Thomas pressed him to sign the necessary report before he left; promising that the ship should be "hung" as directed, and the repairs duly executed. The surveyor accordingly signed the report, dated on the 30th March, which was forthwith sent to Lloyd's, where it was received on the 2nd April. On the surveyor's return, he found the ship tarred inside and outside, which prevented his seeing how far the required repairs had been done. In point of fact the ship was re-trenailed from the wales to the bilge (*i. e.* to the water-line), but not from the bilge to the keel, on the bottom. She was also re-caulked in a manner, although, as it turned out, not properly and effectually. The report stated that the ship was well repaired, re-trenailed and re-caulked from wales to keel, her timbers sound and good, her bolts firm, and her condition in general so good as to entitle her to be classed A 1, of the second class. On the 2nd April, Lloyd's, in this report, granted a certificate of such a classification. On the 5th April, Thomas was in London, and saw Tindall, the owner, who had been examined on interrogatories, in answer to which, being asked whether he had not had an interview with Thomas, and if so, what had passed as to the ship and the repairs, answered, that he had not had any such interview; but who now admitted, on cross-examination, that he had seen Thomas then on the subject, and that Thomas knew the ship would be sold. He avowed that he had designed to have the ship *classed*, and had first applied to Lloyd's, in London, to send down a surveyor for the purpose, but was told the local surveyor must be employed, and the letters from Thomas to him during the repairs, contained these passages on the subject:—

"Feb. 15, 1861.—I think it will make you a good ship

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by being careful. * * * I shall have to put some few planks in the wales, *for class*, as I believe that will be all. If you class the ship, it will be all it will cost to you."

"March 2, 1861.—We had the surveyor here to-day, and he has been to survey the ship. We shall have the class we want for her. He is quite satisfied with her and the work we are doing for her, and has not *ordered anything to her more than what I told you I thought she wanted, i. e.* the planks in the wales. * * * The timber is quite sound. * * * I had to get a few more planks for the wales."

There was no other letter from Thomas produced in the period between this and the 20th April, during which the report of the surveyor was sent to London (on the 2nd April), and the certificate of classification obtained, and Thomas himself had been to London, and seen the plaintiff Tindall about the ship. On his return to Leith he wrote several times, thus:—

"20th April.—I have been busy getting the hold cleared up, to pay with tar before we put water in the hold. We are all finished now but paying her, and the caulking is all done." * * * There were letters from the captain to the plaintiff Tindall put in, in one of which, Feb. 13, he wrote: "The ship shows very little considering her age. * * * I think there will be no difficulty in getting her a class. Mr. Thomas intends trying it." On the 17th March the captain wrote to Tindall that he could have a ship fit for any trade, after the repairs. On the 19th April he wrote: "The ship will be nearly finished to-morrow. * * * Mr. Thomas says she is sure to be sold on her arrival in London."

Tindall was not himself at Leith.

The surveyor at Leith stated that Thomas had applied to him for his report (on which the certificate was given), and that he had no communication with Tindall. The rules of Lloyd's did not require that a ship should be

"hung," but the surveyor had directed it to be done, the better to get at the keel and do the caulking, and he said it might be done sufficiently for the purposes, without its being *completely* done. It appeared from the evidence of Innes, the shipwright employed, that the ship was to some extent hoisted up but not completely "hung," so as to have every part of her bottom raised up and exposed. The surveyor did not know the ship had *not* been hung when he gave his report. He declared, however, that he had the ship ripped open according to the rules, and that Lloyd's surveyor in London ripped her up more than the rules required. He admitted, that had he known what he knew now, he would not have sent such a report as he had done.

He had directed what he deemed necessary to be done, and thought it had been done, from what Thomas told him. When he signed the report (dated 30th March, and sent next day) he had only been over the ship once, and the repairs, it will be seen from the letters, lasted until the end of April. He had been over the ship altogether above twenty times and had not found any reason to retract his report. He said that he relied on Thomas (whom he regarded as the accredited agent of Tindall), and that Thomas had "broken faith with him" and deceived him in the matter. (The report stated that the ship had been "*hung*," and re-trenailed, and re-caulked throughout, and that all the timbers were sound, &c.) He did not think the tarring was unusual.

The repairs were finished about the end of April or beginning of May, and then went out of dry dock to receive a cargo.

In June the ship came from Leith to London laden with coals, and Tindall advertised her for sale, and got one Forester to look out for a purchaser. Through him Baskett was introduced, and he, having looked at the ship while lying loaded in dock, but not having gone over

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her or examined her on the 18th June, entered into a contract to buy her for 2,470*l.* "with all her faults, and in her then state and condition," the vendor to metal and recaulk her at his expense. At this time an inventory was handed to the vendee, in which the ship was described as classed as A 1, red (second class), and lately repaired and re-trenailed; and he was told by Tindall that she had been repaired at the cost of 800*l.*, and that the ship was classed as above mentioned. As to the expense of the repairs, the shipwright's bill only came to 600*l.*, but according to the evidence of the vendor, Tindall, they came to 800*l.* On the 20th June the bill of sale was executed, and a re-assignment by way of mortgage to secure the purchase-money. The vendee swore he had not gone over the ship before the purchase, and bought her on the faith of the classification. He stated that he had bought the ship, as the vendor was aware, for the conveyance of emigrants to Port Natal, and for that purpose it was necessary to have the certificate of the Emigration Commissioners, who required a report from Lloyd's surveyor that the ship was sound and seaworthy. There was evidence that Tindall and Thomas were together at this time, looking after the ship, and that the latter directed it to be felted, with a view to her being metalled, before her bottom was "scraped" in the usual course, and it was suggested that this was with the view of concealing the defects in the caulking and the unsoundness of the trenails and timbers before the surveyor came. Through some accident, however, this was not done, but on the 26th June, Lloyd's surveyor began to examine the ship, and found her so unsound that they not only declared her disentitled to her class, but doubted whether she could be made so, and estimated the repairs required for that purpose at from 1,600*l.* to 1,800*l.* Lloyd's thereupon gave notice to withdraw the certificate of classification, but consented to suspend it on Tindall's pledging himself to have the required repairs executed. He had

since resold her as he said for 1,500*l.* to a person who had advanced him 1,200*l.* just before he bought her, and who was to have shared the profit of any resale.

Tindall had been examined upon interrogatories under an order of WILLES, J., and in his answers denied that he was informed of the repairs required to entitle the ship to receive the class she had acquired.

Q. Did you entrust Thomas with the carrying out of the repairs, and *give him directions and instructions* respecting the same?

A. I did *not* entrust him with the carrying out of the repairs. I may have given him some directions or instructions respecting the same, but I do not remember. The shipwrights and Lloyd's surveyor at Leith carried out the repairs.

Q. Had you any personal interview with Thomas upon the subject of the said repairs or classification; if yes, state when and whether upon any such interview you were informed that Lloyd's surveyor required that the ship should be newly trenailed throughout, &c., and to be *hung*, &c.

A. I had *no such* interview.

Innes, the shipwright at Leith, was called for Baskett, and stated that he did such repairs as Thomas ordered, and *he* ordered none which the surveyor had not directed. It appeared that Innes acted on Thomas's orders. There were no letters from Innes to Tindall, nor from Tindall to him before the work was done, put in, but only *after* it.

Tindall was now called, and stated that he had bought the ship in March, 1860, and had altogether, including repairs, expended nearly 1,400*l.* upon her. In January, 1861, he heard that she had received damage and had put into Leith, and he sent down Thomas to *superintend the repairs and see what was necessary.* Thomas, he said, was a practical shipwright and quite competent. He denied speaking to Thomas about the *classing* of the ship before

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he went down, but he admitted that early in April, Thomas knew it was to be sold, and, as already mentioned, he admitted that about the 5th April, the surveyor's report having been received at Lloyd's, and the certificate of classification issued, Thomas was in London and saw him, and spoke to him about the ship and the repairs.

He had not been *himself* at Leith. (He was not asked whether he had *never* spoken to Thomas about the classification at that time.) He produced and put in the letters from Thomas and the captain to him about the repairs, and also some between him and Innes, the shipwright at Leith, *after* the repairs. But he denied having kept copies of *his* letters to Thomas.

Thomas was proved to have been lately in communication with Tindall, and to have been in Court during the trial, but he was not called on his behalf (*a*).

In the course of the case for Baskett, a witness was called, who, on cross-examination, stated that Baskett had been to look at the ship before the 20th June, the date of the bill of sale, whereupon

Bovill, in re-examining, proposed to ask the witness, with a view to contradict him, by one Ives, whether he had not said to Ives, that Baskett had *not* been to see the ship before the 20th June.

Lush objected, as the *witness* was not adverse, but

ERLE, C. J., thought that he was (*b*), and allowed the question.

The surveyor at Leith being examined as to the means by which Thomas had obtained his report,

Lush objected that Tindall, the principal, could not be affected by the fraud of Thomas, his agent, unless shown to have authorized or approved of it (*c*).

(*a*) *M'Kewen* v. *Cotching*, 27 L. J., Ex. 41.

(*b*) *Greenough* v. *Eales*, 28 L. J. 160.

(*c*) See *Udell* v. *Atherton*, 30 L. J., Exch. 332, where the Court was divided on this point.

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Bovill urged that the principal, Tindall, was, in his action, now seeking to enforce the contract obtained by the means of Thomas's agency.

ERLE, C. J., admitted the examination, but said Tindall's complicity must be shown.

Bovill also put in letters from Tindall to Innes, the shipwright, as to the amount of repairs.

Lush, in proving his case, claimed to put in letters from Thomas to Tindall, to show that Tindall had given directions for due repairs, and supposed that his directions were being followed out.

ERLE, C. J., ruled that, as the question would be as to Tindall's complicity with Thomas, what was conveyed to the mind of Tindall would be material; and therefore admitted the evidence.

Bovill, in cross-examining Tindall, proposed to read a paragraph in an affidavit of his in answer to interrogatories, with a view to contradict a statement he had now made on oath.

Lush claimed that the whole affidavit should be read.

Bovill insisted that this was not so when he merely proposed to contradict.

ERLE, C. J.—The principle is, that so much shall be read as may be necessary to make the question and answer fairly intelligible.

Bovill then read one of the interrogatories and the answer (already alluded to), and cross-examined upon it to contradict the witness. And so of another interrogatory.

At the close of the case,

ERLE, C. J. (to the jury).—The question in both actions is substantially the same, viz., whether Tindall, the principal, was guilty of, or party to, any fraud, or fraudulent representation? The only representations

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brought home to him appear to be as to the repairs, and as to the classification of the ship. As to the former, repairs to the amount stated were executed; and the ship was to a great extent re-trenailed and re-caulked. As to the classification, in point of fact it *had* been obtained: and the question, therefore, appears to come to this,—whether Tindall, the principal, was privy to the means by which Thomas obtained it?

At the time the report was given, on the faith of which the certificate was obtained, no fraud had actually been *committed*, however it may have been *contrived* by Thomas. For the surveyor *knew* that the repairs had not *then* been done, nor the ship hung, and he relied on the promise of Thomas that these things *should* be done. If Tindall was an accomplice in a contrivance by Thomas fraudulently to get the report, in order to get the certificate, find for Baskett; if not, and if Tindall was not a party to any fraudulent representation, then find for him.

Verdict for Baskett in both actions.

Guildhall, coram Byles, J.

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MARTIN *v.* LOEÏ.

In slander, a transaction which might explain the words used, but of which the hearers were not aware, and to which the defendant did not *expressly* refer, not allowed to be proved.

SLANDER. The words laid were, "You are a thief, a rogue, and a swindler."

Plea: not guilty.

Ribton for the plaintiff.

Henry James for the defendant.

The case for the plaintiff having been proved, it appeared that the words laid were spoken in the defendant's shop, in the presence of several persons.

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Henry James, for the defendant, proposed to show that the plaintiff had gone into a shop next door and bought goods which he had not paid for, and then resold at a lower price; and that the defendant, having heard of this transaction, in the plaintiff's presence, (but *not* in the presence of those who heard the slander,) *afterwards* spoke to the plaintiff, with reference thereto, the words laid. He proposed to elicit this from the defendant, but

BYLES, J., intimated that he had better reserve the matter until it was seen whether it would arise out of cross-examination; and

Ribton, for the plaintiff, having cross-examined as to it,

Henry James, in re-examination, was allowed to ask the defendant about it; but when he proposed to call the shopkeeper in order to prove the transaction, with a view, not to justify or excuse the slander, but to show that the words were not meant to impute an indictable offence, but merely an unfair transaction,—it not appearing that any of the hearers of the slander were privy to, or aware of it,

BYLES, J., refused to allow the witness to be called (*a*); and the case ended in a

Verdict for plaintiff, one farthing.

(*a*) The test being, not what the *defendant* may have *meant*, but what the *hearers* must have *understood*. It would have been otherwise had *they* all been privy to the transaction, or been present when the defendant heard of it. The matter, if available at all, could only be so under the general issue, whether as ground of privilege or otherwise. But it was not put on *that* ground; and *semble*, it could not be. See *Dains* v. *Hartley*, 18 L. J., Ex. 81; *Barnett* v. *Allen*, 1 F. & F. 125.

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Coram Byles, J.

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OAKELEY *v.* OODDEEN (*a*).

In an action on a bill or note, and a common money count, special pleas to the one, and never indebted to the other, if the plaintiff does not undertake to prove a *different transaction* on the latter count, the defendant is entitled to begin. And if the second count is, in fact, for the consideration of the bill, (with charges,) and the question is, the authority of a party to receive the money and give the bill or note, on behalf of the defendant, it is in effect all one transaction and one question. Notice to the indorsee's agent in the transaction is notice to the indorsee, and if a party suspects a fraud and does not ask as to it, lest he should know it, he had sufficient notice.

FIRST count on a bill drawn by Chard, on 28th September, 1858, for 6,500*l.*, twelve months after date, accepted by the defendant and endorsed to F., who endorsed to the plaintiff.

Second count (added by amendment) for money lent,—claim, 6,700*l.*

Pleas: 1. (to first count), that before the bill was completely made, he, at Chard's request, wrote his name across a blank piece of paper with a stamp, and gave it to him with authority to draw a bill for 100*l.*, whereas he drew it for 6,500*l.*

Averment, that no consideration for acceptance or endorsement.

2. Similar, and averring *notice* to F. and the plaintiff.

3. That the acceptance was obtained by the fraud and covin of Chard, the drawer, and others in collusion with him.

Averment of notice to the plaintiff.

4. That the bill, after drawing and acceptance, was altered in material parts, without the defendant's consent.

5. (to the second count), never indebted.

M. Chambers, *Macnamara*, and *Harrison*, for the plaintiff.

Hawkins, *Coleridge*, *Hastings*, and *Inderwick*, for the defendant.

The particulars of demand, dated 14th May, 1861, claimed under the indebitatus count the sum of 5,000*l.*

(*a*) Reported from the notes of Mr. Inderwick.

lent by the plaintiff to the defendant, on or about the 28th September, 1858.

[The cause had been tried before ERLE, C. J., *without* the common count, when of course the defendant had begun.]

Hawkins, for the defendant, claimed the right to begin, as the action was substantially on the *bill*; and the second count was merely added for the purpose of gaining the right to commence by means of a colourable claim.

BYLES, J.—Does the plaintiff intend to give evidence on the *second* count, independent of the *bill?*

M. Chambers.—Yes. A substantially different case. [But he *did* not deny that it was *all one transaction.*]

Hawkins referred to the claim in the declaration to show that the claim was only for the amount of the bill and interest.

M. Chambers.—The plaintiff claims 5,000*l.* as money lent, apart from the bill, as shown by the particulars of demand.

BYLES, J.—Then in that case your claim would have been 11,500*l.*

M. Chambers.—The claim is merely formal.

BYLES, J.—I cannot allow the addition of the indebitatus count to alter the right to begin, and the *onus* of proof. The defendant must begin (*a*).

A loan of 5,000*l.* with a premium of 1,000*l.*, and interest at 10 per cent., had been negotiated by Chard, the drawer, agent, as was alleged, for the defendant, with one Roy, as attorney and agent of the plaintiff; and the bill given for the amount *as part of the same transaction.*

It was admitted that 5,000*l.* had been advanced by the plaintiff to Chard; and that, as regarded the plaintiff him-

(*a*) See *Smart* v. *Rayne*, 6 C. & P. 721.

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self, personally, there was no knowledge of the alleged fraud.

And there was no evidence of the alleged alteration.

The case for the defendant was, that *Roy* was privy to the alleged fraud.

The defendant's case being closed, Roy was called for the plaintiff.

Hawkins replied on the whole case (*a*).

BYLES, J. (to the jury).—If Chard was the defendant's agent to receive the money advanced upon the occasion in question, there is the same issue in fact on the count for money lent, as upon the bill itself.

No doubt 5,000*l.* was handed to Chard; and *if he was defendant's agent in the transaction, then defendant is liable on the bill.*

Therefore I suspect that the second count on the money lent, was added merely to get the right to begin.

No doubt it is a most important point in a case of this kind; for it is a great disadvantage to a plaintiff to have to put his case before a jury already prejudiced perhaps by the case for the defendant. And the defendant has had a *very great advantage in beginning.*

Defendant must satisfy you that there was fraud, and that his attorney, Roy, (as it is admitted that personally the plaintiff was not privy to the fraud,) had notice of it.

The main questions for you to consider are:—Was the bill originally affected with fraud, and never authorized or ratified by the defendant?

Did the plaintiff advance valuable consideration? and was 5,000*l. lent to the defendant?*

Had Roy notice of the fraud?

(*a*) See, as to the right to begin in similar cases, *Smart* v. *Rayne*, 6 C. & P. 721, where *per* Parke, B., if there is no evidence on the account stated, except the bill, defendant must begin. *Mills* v. *Oddy*, 6 C. & P. 728; *Frith* v. *M'Intyre*, 7 C. & P. 44.

That is, did he either know it, or suspect it, and, having *means* of knowing, wilfully shut his eyes to it?

It is not necessary that the party should know of the *specific* fraud, or know all the circumstances of it. If he suspected a fraud, and chose not to ask, *lest he should know*, he had sufficient notice (*a*).

Jury discharged, without verdict.

(*a*) *Raphael* v. *Bank of England*, 17 C. B. 161.

Coram Keating, J.

WILLIAMS *v.* WARD.

Michaelmas Term.

In an action for assault and battery, the defendant justifying the assault and the battery (in defence of possession), and plaintiff replying excess, and proving that the defendant struck him with his clenched fist, the jury finding for the plaintiff, damages forty shillings; the Judge—the justification being proved—*certified to deprive* him of costs, under C. L. P. Act, 1860, s. 34. And the Judge taking time to consider may certify *next day*.

ASSAULT and battery.

Plea, that the plaintiff was unlawfully in the house and premises of the defendant making a disturbance, and that the defendant desired him to withdraw, and on his refusing, *molliter manus imposuit*, &c.

Replication: 1. Taking issue.

2. Excess.

Rejoinder: not guilty. Issue.

Hawkins, Seymour, and *Gibbons*, for the plaintiff.

Karslake and *Keane* for the defendant.

It appeared that the defendant had formerly lived with a Miss H. and she had illegitimate children by him, who were in his custody. The plaintiff had gone with H. to the defendant's house with the object of her seeing them. She rung the bell, the street door was opened, and she went in. The defendant was in the passage and allowed her to pass, but, according to the plaintiff's account, rushed at him and struck him with his clenched fist on the eye so as to inflict a serious injury.

The defendant was called and his case was, that the

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plaintiff being in his house, and refusing to leave when requested, he forcibly removed him, but did not *strike* him.

KEATING, J. (to the jury).—Even although the defendant had *invited* the plaintiff to his house, yet if afterwards he requested the plaintiff to withdraw and he refused, the plaintiff might lawfully remove him, using no unnecessary violence. And the question therefore is, whether he *did* use unnecessary violence? If so, find for the plaintiff.

Verdict for the plaintiff, damages, forty shillings.

Keane, for the defendant, just after the trial applied to the learned Judge, under the Common Law Procedure Act, 1860, s. 34, to certify, in order to deprive the plaintiff of costs (*a*), "that the action was not brought to try a right (beside the mere right to damages), *and* that the trespass or grievance was *not* wilful *and* malicious (*b*), *and* that the action was not fit to be brought" (*c*).

KEATING, J., took time to consider (*d*), and *next day*, during the sitting, certified.

(*a*) Lord Denman's Act, 3 & 4 Vict. c. 24, only applying where the damages are *less* than forty shillings, so that the plaintiff would get his costs *without* certificate.

(*b*) The jury had found *excess* of violence; and of course a blow in a certain sense must be always wilful; hence the phrase is *conjunctive* "*and* malicious;" as to which see *Goodall* v. *Ensall*, 2 C., M. & R. 249; *Foster* v. *Pointer*, 8 M. & W. 395; *Sherwin* v. *Swindall*, 12 M. & W. 783; that malice implies any improper feeling, *e.g.*, *excess* of anger.

(*c*) These are the words used in the County Court Act, 9 & 10 Vict. c. 95, s. 129, (see *Hatch* v. *Lewis*, Exch. M. T. 1861), and seem to imply an action in which there could not be any *reasonable ground* for expecting substantial damages, *i. e.*, an action "frivolous and vexatious."

(*d*) The words of the enactment are, "shall *immediately afterwards*" certify, &c. But in legal parlance that may mean, at the same sittings or assizes, all being as one day. If the word "immediately" were omitted, the Judge could certify even *after* the sittings or assizes. *Bennett* v. *Thompson*, 25 L. J., Q. B. 378. And even when the word is "forthwith," the opposite party making no objection to time for consideration, cannot object that the certificate is after trial. *Heden* v. *The Atlantic Royal Mail Steam Navigation Company*, 29 L. J., Q. B. 191.

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Coram Keating, J.

PENNELL AND ANOTHER *v.* CORNISH.

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A defence, by way of discharge, arising after action, should be so pleaded; and, if not, it is doubtful whether a Judge will amend.

ACTION by assignees of a bankrupt on bills of exchange drawn by him in May, 1861, and accepted by the defendant.

Plea: that by an order of adjudication made (not saying *when* or whether after action), under 1 & 2 Vict. c. 110, the defendant was duly discharged from the said causes of action.

Replication: that the defendant was *not* discharged *as alleged.* Issue.

Honyman for the plaintiff.

Keane for the defendant.

On the 23rd May last the creditor had become bankrupt. On the 27th May the insolvent was arrested, and on the same day petitioned the Court.

On the 15th July this action was brought.

On the 31st July the vesting order was made, *i. e*, *after* action.

Keane, to prove the plea, put in the adjudication and the schedules, and identified the bill declared on, with one included in the schedule, and then proposed to put in an office copy of an affidavit in the Insolvent Court, in which the deponent stated that he had on a certain day duly served a copy of the notice by posting the same to the creditors.

Honyman objected, and

KEATING, J., doubted whether it could be admitted as evidence of the fact of service of the notice.

Keane thereupon withdrew it, and recalled the bankrupt, who stated that when he became bankrupt he had left his house not entirely, but from time to time returning, not

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finally leaving until September last. He could not say that he had received the notice, but would not swear that he had not heard of it, and admitted that he had heard of the insolvency.

Keane then contended that his proof had gone far enough, that the order was *primâ facie* sufficient, and that in the proceedings there was some evidence of notice, which it was for the plaintiff to get rid of.

Honyman contended that there was no proof of notice.

KEATING, J.—If it is necessary for the defendant to *prove* notice, I do not think it is proved. If it is necessary for the plaintiff to disprove it, I don't think it is disproved. But if it is to be pressed, it is a question of *fact* for the jury.

Honyman contended that, as the plea did not *state* that the discharge was *after* action, it must be taken on the record to have been *before:* Common Law Procedure Act, 1852, s. 68: and therefore the plea was disproved.

Keane applied to amend, as it was a mere pleader's blunder.

Honyman objected, that there ought to be no amendment, because, by Pleading Rule 22, H. T. 1853, if the discharge had been truly stated, the plaintiff might have discontinued without costs (*a*).

Keane.—The plaintiff could not have been misled, for he knew of the insolvency.

KEATING, J., would not amend, and his impression was in favour of the plaintiff, but offered to reserve the main question; and the amendment, as incident thereto, which was agreed to, and so, subject to this,

Verdict for plaintiff.

(*a*) *Vide Bello* v. *Ionides, post*, p. 677, where a similar point arose.

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Coram Erle, C. J.

FOLEY AND ANOTHER *v.* TABOR.

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DECLARATION on a marine policy, dated 24th September, 1859, on ship, *Storm Queen*, seaworthy, &c, at and from London to the Cape, while there, and thence to Kurrachee, for 4,250*l.* *on ship*, valued at 7,000*l.*, underwritten by the defendant for 150*l.*, at 50*s.* per cent.

Averment of *partial* loss, of 50 per cent. repaired; and afterwards of *total* loss.

Common money counts, and on account stated.

Pleas: 1. That ship in policy mentioned was at the commencement of the risk, and time of setting sail, unseaworthy.

2. Policy procured by fraud (afterwards withdrawn).

3. That, at the time of the contract mentioned, certain material facts, which ought to have been communicated to the defendant, were wrongfully concealed from defendant, who, by such concealment, was induced to subscribe the policy.

4. As to 75*l.* (the defendant's share of the partial loss at 50 per cent.) parcel of the money claimed by the *common* counts, that the said sum of 75*l.* was claimed by plaintiffs as money payable to them under and by virtue of the policy mentioned in the first count and not otherwise, and that except by virtue of such policy plaintiffs not entitled to 75*l.* or any part thereof, and that at the time of the commencement of the risk, and of the ship setting sail, she was unseaworthy.

5. As to the 75*l.*, similar averment identifying it with

As a policy on a ship may be avoided, by unseaworthiness, caused either by overloading or bad stowage, tending to increase the danger or difficulty of navigation, and so to enhance the rate of premium—the not mentioning the nature of the cargo—if the proportion of dead weight in it *must* lead to bad stowage, *may* be such a concealment as will vitiate the policy. But it will not be so if the underwriter knew, or had reason to believe, that the cargo would include *some* proportion of dead weight, and the agent of the assured, when he effected the insurance, did *not* know *what* proportion. In such a case, knowledge of, or concealment from, the particular underwriter may be material, but not the knowledge or ignorance of *subsequent* underwriters of a *different* policy (even although the actions on *both* policies are *consolidated*); and *quære*, as to *previous* underwriters of the same or *another* policy. In such an action, with common counts, the pleas being concealment and unseaworthiness, applied by proper averments to those counts, the *plaintiff* is entitled to begin.

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the claim on the policy, and that material facts were concealed from defendant, by which he was induced to subscribe the policy.

6. As to 75*l.*, similar identifying averment, and that policy was procured by fraud (withdrawn).

7. As to 3*l.* 15*s.*, further part of the sum claimed by the money counts, payment into Court.

Replication: joining issue on all the pleas except the seventh, and as to the seventh, accepting the money in satisfaction.

These two sums of 75*l.* and 3*l.* 15*s.*, were the only sums claimed by the particulars.

The second and sixth pleas were afterwards withdrawn.

Bovill (*Honyman* and *F. M. White* with him), for the defendant, claimed the right to begin.

Lush (*Cleasby* and *Watkin Williams* with him), for the plaintiffs, objected.—The claim is for unliquidated damages. He cited *Mercer* v. *Whall* (*a*).

Bovill offered to admit that if the plaintiffs were entitled to recover anything beyond the total loss, the amount they were entitled to was the amount claimed by the particulars (*b*).

Lush declined to accept the admission.

ERLE, C. J., decided that the plaintiffs should begin, the damages being *unliquidated* (*c*).

The present policy was originally effected on 24th Sep-

(*a*) 5 Q. B. 447.

(*b*) See *Luckie* v. *Bushby*, 13 C. B. 864, which decides that in every case where there is a claim for an average loss, it is a claim for unliquidated damages, even where there has been an adjustment. But see also *Irving* v. *Manning*, 6 C. B. 391, that a contract of insurance may be liquidated, if the value is ascertained. In an action on a *life* policy, the only pleas being fraud, or false representation, the *plaintiff* is entitled to begin; *Geach* v. *Ingall*, 14 M. & W. 95.

(*c*) See *Baskett* v. *Tindall*, *ante*, p. 644, where the sum was fixed.

tember, 1859 (*a*), by one Aikman, of the firm of Foley and Aikman (the plaintiffs), brokers, on behalf of the owner, one Law. Previously to the policy, Foley had chartered the ship for "lawful merchandize" to one Gull, to the Cape and Kurrachee, the charter containing a clause that she should not carry *beyond* her registered tonnage, of iron. The registered tonnage was 1,022 tons. The ship was strongly built, only two years old, A 1 class, and admitted to have been sound and seaworthy at the time of the charter and of the original insurance.

On the 24th September, 1859, the policy was originally underwritten by one Hislop and several others, including one Hooper, on behalf of and for the defendant, who subsequently subscribed again; and also in October, subscribed another policy for 1,500*l.* (*a*). The co-plaintiff, Aikman, swore that when he effected the policy he did not know of the clause in the charter as to a cargo of iron. He knew the ship was to carry iron, but he did not know the weight or quantity: and his *partner*, the co-plaintiff, Foley, who had to do with the *charter*, had nothing to do with the *policy*. It was generally known at that time among underwriters, that as railways were being made in India, ships to Kurrachee usually carried out iron. Nor was there any objection to iron properly stowed, *i. e.*, so loosely, and with such a proportion of lighter goods occupying larger space, as that the average should approach the standard of good stowage, forty cubic feet of *measurement* to every ton of *weight*. Although there were 1,107 tons of iron, only 800 tons were strictly speaking dead weight, *i. e.*, iron in bars, the rest being railway plant

(*a*) There had been a subsequent policy in October, on which, as on the present, various actions had been brought, all consolidated by an order that the others should abide the event of the *present action*. That such is the effect of the usual consolidation order, *vide Syers* v. *Pickersgill*, 27 L. J., Ex. 5; *Lewis* v. *Banks*, 27 L. J., C. P. 247. And as to the *result* in regard to admissibility of evidence, not relevant to the action tried, *vide* the ruling of the Lord Chief Justice, *post*.

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(wheels and the like), *not* solid in construction. And there was a book kept at Lloyd's, accessible to underwriters, in which the cargoes of insured ships were entered. Aikman, the co-plaintiff, said he had told the underwriters that the ship would take a "general" cargo. He admitted that he had not *mentioned* the iron, and he was not asked about it.

The ordinary rate of premiums for Kurrachee was 40*s.* per cent.; and cargoes even of iron had been insured at even lower rates, direct to Kurrachee.

But Aikman admitted that had it been known that the ship was to carry as much as 1,000 tons of iron, he should have found a difficulty in effecting an insurance on the ship at less than 80*s.* per cent. He stated, however, that he conceived the rate at which the policy was effected, viz., 50*s.* per cent., was estimated with reference to some increase of risk, as the *ordinary* rate was 40*s.*; the rates even for iron varying from 40*s.* to 80*s.* The policy was expressed to be upon *any kind* of goods, and on the ship.

The policy having been effected, the ship proceeded to load, and on the 19th October another policy for 1,500*l.* was underwritten by other underwriters, not including the defendant. [It had been ordered by consent that all actions on this and the other policy should abide the event of this action: *vide ante*, p. 655, n. (*a*).]

On the 13th November the ship sailed, and on the 15th November the first return of the nature of her cargo was made to Lloyd's. Next day, on the 16th November, several of the first underwriters, not including the defendant, nor Hislop, whose name was at the head, declared off and returned their premiums (*a*).

(*a*) That a party must repudiate a contract for fraud, when first he knows of it, see *Selway* v. *Fogg*, 5 M. & W. 83. And that this doctrine applies to concealment in cases of insurance, see *Russell* v. *Thornton*, 29 L. J., Ex. 9.

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On the 14th November, the defendant underwrote the first policy. There was evidence that when the ship was laden, and before she set sail, she was too deep in the water; and there was a contest of evidence as to whether her free-board, *i. e.*, her depth *above* water, was, as it ought to have been, 5 ft. 6 in., or, as on the part of defendant it was sworn to have been, 3 ft. 6 in. There was evidence that ships of her class took 50 per cent. more dead weight than the registered tonnage; and she loaded 1,100 tons of iron (of which at least 800 or 900 tons were dead weight), and above 800 tons of general measurement cargo, packed above the iron, and to be discharged at the Cape. With respect to the stowage of the iron, the two stevedores who stowed it were called, one for the plaintiffs, the other for the defendant, and *both* stated that it had been well-stowed. Nor was any person skilled in stowage called on the part of the defendant to prove that it was *ill*-stowed.

There was a great contest of evidence of *surveyors*, both as to whether the ship was overloaded and ill-stowed. But no complaint had been made to the brokers or owners before she sailed, that she was either overloaded or ill-stowed, though there was evidence that it was usual to make such complaint if any ground for it was observed.

It was proved, however, that it was very material, with regard to the navigation of the vessel, in what manner iron or other heavy weight was stowed, and that bad stowage of it would tend to make the vessel pitch, roll, and strain. The log was produced to prove that during the voyage to the Cape, even while the weather was not foul, the ship *did* pitch, roll, and sail heavily. On reaching the Cape in February, some rough weather ensued, and the ship struck upon a rock before she got safely into port. When there, the 800 tons of general cargo being discharged, there was a claim by the owners of the general cargo against the owners of the ship for damage, and the ship was surveyed several times by surveyors of the under-

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writers, and their reports were put in. It did not appear that any part of the iron had "started" or "shifted," save about 50 tons; and it did not appear that *this* had anything to do with the loss of the ship.

The first report of the surveyors stated that though the water had come in through the hatchway, and the *cargo* had been damaged, they were unable to discover any serious injury to the *ship*, and that there had been no straining of the hull, but only at the masts, which, it was suggested, was caused by the rolling of the vessel; though on the part of the defendant it was urged that the *rolling* was the result of bad stowage or overloading.

The surveyors, however, proceeded to say that having considered "the dangerous way in which the ship was loaded," some hundred tons of the iron should be taken out and re-stowed, which was done.

A second report stated that though some sheets of copper required repair, there were no symptoms of strain on the hull, and that the seams were all close and firm; that there was only some strain about the hatchway; and a diver declared that the bottom was *not* strained.

On the 1st May, the void created by the discharge of the 800 tons having been filled by 200 tons of deal, and the re-stowing of some hundreds of tons of iron in a looser manner, the surveyors reported that the ship was "in a *fit state* to prosecute her voyage." She accordingly sailed; but in a few days, the weather not being rough, began to leak, the water rose rapidly, the crew had to leave her, and she soon after sank. The surveyors being now examined, stated that when the vessel sailed there had been, by reason of overloading, a "severe straining of the entire fabric of the ship," and that she was *not* in a fit state to sail on her voyage. [To account for the variance between this evidence and their reports, it was suggested that the reports had mainly reference, not to the *ship*, but to the *cargo*.]

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Hislop, whose name was the *first* underwritten, and who had *not* declared off, was not called to show any misrepresentation or concealment as regarded *him*. And Tabor, the present defendant, had subscribed the second policy in October, after subscribing the first, and had not disclaimed either of them.

Hooper, who had subscribed on behalf of Tabor, was prevented by illness from being called; but neither he nor Tabor, the defendant, had disclaimed, nor ever, till now, set up that they had been deceived.

In the course of the case for the plaintiffs, a witness being asked whether other ships, about the same period, were taking iron,

Bovill objected, that what other ships were taking was irrelevant; but

ERLE, C. J.—It may be material, as showing what was usual in loading ships.

A witness was called to prove that the *defendant* had underwritten a *subsequent* policy on the portion of the cargo destined for Kurrachee.

Bovill objected to the evidence as irrelevant; but

ERLE, C. J., held it relevant to the issue upon the plea of *concealment*.

In the course of the case for the *defendant*, one Barker, who had underwritten the second policy in October, was called, and asked whether the rate of premium for iron was then greater than for general cargo?

Lush objected; but

ERLE, C. J., admitted the question, the co-plaintiff, Aikman, having been examined on the subject.

The witness was then asked, whether there would be a difficulty in insuring the ship with liberty to carry iron for less than 80*s*. per cent.?

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Lush again objected; but

ERLE, C. J., allowed the question.

The witness was asked, whether the rates of insurance were not rising, and whether 80*s.* was not the current rate for ships mainly loaded with iron?

Lush objected; but

ERLE, C. J., held the question admissible, and it was answered in the affirmative.

The witness was asked, whether 50*s.* was the current rate of premium for ships so laden?

Lush again objected; but

ERLE, C. J., allowed the question, and the witness answered it in the negative.

The witness having stated that he *thought* the co-plaintiff, Aikman, had offered him this risk,—it was asked, did you know whether the ship was going to Kurrachee?

Lush objected, that as the question related to a different and *subsequent* policy, it could not be asked, as it must be irrelevant.

Bovill contended that as the actions in *both* policies were consolidated, the question was admissible; but

ERLE, C. J.—The actions are consolidated thus: that the others are to abide the event of *this* action (*a*), *i. e.* an action on the *former* policy. The question is inadmissible.

Another of the underwriters on the policy sued upon in the *present* action, being called on the part of the defendant, was asked as to *what* representation was made to him.

Lush objected; but

ERLE, C. J., allowed the question.

[The witness, however, admitted that he had made no *inquiries* as to the cargo; and there was no *positive*

(*a*) *Vide ante*, p. 665.

evidence that the first underwriters, in particular the defendant, did *not* know that the ship was taking iron; while, on the other hand, the plaintiff, who effected the policy, while he could not say that he *told* them so, swore that he did not at the time he did it know of the *terms of the charter*, or the *weight* of iron to be carried. Nor was there any evidence that he knew of the quantity or weight of iron which *was* to be carried; but he was told it was to be a general cargo.]

He was then asked (having stated that he knew of a charter, but had *not* asked its terms), whether he was told that the ship was to be at liberty to carry iron to the amount of its registered tonnage.

Lush objected; and the question was withdrawn.

At the close of the evidence,

Honyman, in summing up for the defendants, relied on both the grounds of defence—unseaworthiness and concealment.

Lush, in reply, contended, as to the first, that the sole question was, whether the ship was seaworthy with reference to her *own* safety, not as to the safety of the cargo. And as to the second ground of defence, concealment, he contended that the insured was not bound to communicate to the underwriter, unasked, *any* fact, touching either ship or cargo, occurring before the risk commenced, even although it affected seaworthiness or rate of premium; for as to seaworthiness, there was an implied warranty without inquiry, from the opening of the risk; and as to other matters, it was for the underwriter to inquire.

ERLE, C. J. (to the jury).—There are two defences relied on—unseaworthiness and concealment.

As to the first, the assured warrants that the ship is seaworthy; and seaworthiness is a word of which the import varies with the place, the voyage, the class of ship, or even the nature of the cargo. In this case, the unseaworthiness

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relied on had reference to the *cargo*, and is rested on two grounds,—that the ship was *overloaded*, and that the cargo was badly *stowed*. And you are to take this as the law on the subject,—that a ship will be unseaworthy if the risk is materially increased by reason of difficulty in navigating the ship, caused either by overloading or by bad stowage of the cargo. There is a conflict of evidence on both points, which it is for you to consider.

It is not necessary for the insurer to make out that the *loss* was caused by the unseaworthiness relied upon. The question depends upon the state of the ship at the time when *she sailed upon her voyage*. All that happened afterwards is important only with regard to the retrospective light it may throw on the state of the vessel *at that time*. Was she unseaworthy by reason of her being either overloaded or badly stowed? If so, find for the defendant.

Secondly, as to *concealment*. This ground of defence is, that a material fact known to the assured was concealed from the underwriter. The contract of insurance is one which requires the most perfect good faith on the part of the assured. And the general rule of law, as applied to this case is, did the assured neglect to communicate to the assurer any fact known to the assured, and not known to the insurer, material for his guidance, in respect of the premium to be demanded? *Both* parts of the question must be answered. The material fact must have been *known* to the assured, and *unknown* to the insurer. As to the *latter* point, *actual* knowledge is not essential if the insurer knew he had the *means* of knowing the fact, and it was *within* his knowledge. If, for example, he knew that he could learn the exact cargo at Lloyd's, and chose not to ascertain it, knowing or believing it would include iron, it was *within* his knowledge (*a*). The

(*a*) In an action on a policy of insurance, Lloyd's Shipping List was held to be admissible against the underwriter, without proof of his having seen it, and to be primâ facie evidence of the time of sailing.

material fact must have been *known* to one party and not within the knowledge of the other. In this case, the material fact alleged to have been concealed was the charter under which the ship was to carry iron to a weight not exceeding her registered tonnage, *i. e.*, above 1,000 tons. First, was it material? As it is admitted that the premium would have been 80*s.* instead of 50*s.*, if that fact had been known, it must have been material, within the rule of law I have laid down. Next, did the assured know of it? If the co-plaintiff, Aikman, knew of it, they *did* know it. Then, did the defendant know of it, or might he have known of it if he chose (*b*)? It is strong for the plaintiffs that the defendant underwrote, not once but twice, and after other underwriters knew what the cargo was to be.

All these matters are for you; and if either there was unseaworthiness or concealment, find for the defendant; if neither, for the plaintiffs.

Verdict for the plaintiffs.

But where there was a concealment by the insurer of material facts, and an allegation of facts which were untrue, viz. as to the time of sailing, and the underwriter had acted thereon, without, in fact, seeing the list at Lloyd's:—The Court held, that the underwriter was not bound thereby, and that the Judge ought to point out to the jury, as material, such concealment and misrepresentation. *Mackintosh* v. *Marshall*, 11 Mee. & W. 116. But the present case goes much further as regards the knowledge of the underwriter, than that cited, and the above direction of the Lord Chief Justice does not appear to conflict with it. For, in the present case, there was evidence that all the underwriters knew that iron would be taken; and that they knew they could learn at Lloyd's *how much*.

(*b*) *Vide* the ruling of BYLES, J., *ante*, p. 659.

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Coram Erle, C. J.

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BELLO AND OTHERS *v.* IONIDES.

On a plea of foreign attachment, not stating that it was *after suit*, it is necessary that it should be proved that it was *executed* before suit. And if it appear that it was after *plea*, and after time for pleading expired, the Judge will not amend.

On a replication of fraud it is not enough to show that there has been a *preference* (unless in case of bankruptcy), nor that the defendant gave some information to the plaintiff in attachment *after* it was levied, and has been indemnified by him, it not appearing that the plaintiff in the attachment was debtor to him.

DECLARATION (in *November*, 1861), that in consideration that the plaintiffs would deliver to the defendant certain policies of insurance for 1,600*l.*, and 200*l.* on a ship reported as lost, the defendant promised the plaintiffs to pay them the amount of the insurances as soon as recovered from the underwriters.

Averment: that before action the defendant recovered the amount.

Breach: non-payment. Count for conversion of the policies. Common money counts.

Pleas: (dated 3rd December, 1861) to the first count, and as to 200*l.* parcel of the monies in the third count, and as to 553*l.* 11*s.* 4*d.* for the parcel, &c., making together 753*l.* 11*s.* 4*d.*, the custom of foreign attachment in London, stating that, "on default, the Court awards execution on pledges to restore the money attached, if within a year and day the defendant disproves or avoids the debt attached. And that after such pledges found, and *execution* had, of such sum, so in the hands of the person attached, such person and the defendant in the plaint is discharged against the plaintiff of so much of his debt."

Averment: that after the averring of the plaintiffs' claim, Melas attached the said sum of 753*l.* in the hands of the now defendant as garnishee, and that afterwards, in all respects, according to the custom on the 21st August, 1861, *consideratum est*, that Melas should have execution of the said sum, and thereupon [not stating when] Melas *had* execution of the said sum against the now defendant as garnishee, under which execution the defendant was forced to, and did pay the said sum, *prout patet per recordum, &c.*

Replication taking issue; and also, that the judgment was *fraudulently and collusively obtained* by Melas, by and through the *fraud, covin, and collusion* of Melas and the defendant. Issue.

Bovill, Lush, and *Honyman* for the plaintiffs.

M. Smith (with him *F. M. White* and *Watkin Williams*), for the defendant.

The case for the plaintiffs having been proved,

White, for the defendant, put in the record of the proceedings on the attachment, (whence it appeared that the attachment was on the 26th July,) and on the back was an award of execution, to which there was no seal.

Bovill pointed out this, but

ERLE, C. J., said he should assume all things regular until shown to be irregular.

White then called the defendant, who stated that he had been for years the broker, both of Melas and Co., and of the plaintiffs, and this was known to *both* firms. He had monthly accounts with Melas and Co., settled on the 15th of each month, and in July he owed them a small sum (about 70*l.*) which he paid shortly afterwards. It was known at Lloyd's when policies were to be paid, and that the day for paying was Saturday. The day for paying the policies in question was on Saturday, the 26th July, and at three o'clock on that day he received the money. On the same day the attachment had issued, and he produced the notice served upon him. The balance due from him to plaintiffs was 753*l.* 11*s.* 4*d.*, and he swore he did not know how Melas and Co. had ascertained the amount, and that he had not told them. It appeared from his accounts that in July the balance of account between him and Melas was in favour of *Melas and Co.*

In July, the plaintiffs Bello and Co. had called a meeting of their creditors, and on the 15th and 17th July other attachments had issued against the defendant—one

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at the suit of Melas, on which he had paid a large amount into Court. At the meeting of creditors the defendant found that the firm of the plaintiffs consisted of five instead of *two* persons (as supposed), and he had informed Melas and Co. of this, when the notice of attachment was served in the name of the *two*. He admitted that Melas had given the usual securities to restore the money, if he were forced to pay it over again, and had also indemnified him in this action. He swore that *he* had no interest in the matter (except *not* to have to pay it twice over), and that it was a matter which only concerned Melas and Co. The judgment was on the 21st August, and there was an *award* of execution. The defendant had paid the money into Court on the 4th December, the *plea* being dated the 3rd December. [There was no proof that execution had *issued*, save the indorsement on the record of an *award* of execution. The writ was not produced.]

ERLE, C. J.—There is no proof of fraud. A preference of one creditor for another is no fraud, except in case of bankruptcy (*a*). And here the plaintiffs did not become bankrupts.

Bovill.—This is not a case of *preference* of one creditor for another; because Melas and Co. were *not* creditors of the defendant to any but a small amount, paid almost immediately. It is a case of a debtor choosing to pay his creditor's creditor rather than his creditor, and colluding with the other creditor for that purpose. It is for the jury.

ERLE, C. J.—Assuming evidence of collusion, of course it is for the jury. And, if the balance of account as between Melas and Co. and the defendant had been *against* Melas and Co., and it had appeared that the attachment had been a trick practised between them to pay their debt to the defendant, at the expense of the plaintiffs, there

(*a*) *Vide Wood* v. *Dixie*, 7 Q. B. Rep. 807.

would have been a case for the jury. But what evidence is there of that? The evidence is the other way, that the balance was in *favour* of Melas and Co. If I leave any question to the jury, it can only be whether they believe the defendant, and no witness being called to contradict him, what reason is there why they should not believe him?

Bovill said he did not deny the truth of the defendant's evidence, but contended that it was sufficient to leave to the jury on the replication.

ERLE, C. J.—Taking his evidence to be true, I am of opinion that there is *no* case for the jury.

Bovill.—Still the plea is disproved. It alleges payment, and is dated the 3rd December, whereas the payment proved was on the 4th December, after pleading. [And of course *after suit* (*a*).]

White asked to amend, but

Bovill pointed out that the time for pleading, after having been renewed again and again, expired on the 3rd December, so that the defence could not have been pleaded; and on the morning of the 4th, plaintiffs might have signed judgment, and the attachment would then have been no answer, as there must be execution *executed* to avail against a judgment.

ERLE, C. J.—Assuming that to be so, then I do not see how I can amend. If it had been a mere question of discontinuing without costs (*a*), that might have been a matter for *terms* of amendment. But as the case now stands it seems to go to the defence itself.

Verdict for the plaintiffs, 753*l.* 11*s.* 4*d.*

(*a*) *Vide Pennell* v. *Cornish*, *ante*, p. 661.

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Coram Willes, J.

Michaelmas Term.

SMITH *v.* HALLEN.

A Judge will try with a common jury a cause made a special jury case only for delay.

A barrister has a lien for fees on a commission.

INTERPLEADER issue.

On the case being called on in the sittings in Term,

Hawkins, for the plaintiff, informed the Court that it had been made a special jury case.

Parry, Serjt., for the defendant, said, the rule for that purpose had only been served last night. The record had once been withdrawn, then again postponed, and afterwards delayed to examine a witness by commission as unable to attend. The rule was only for delay, and the cause ought to be tried (*a*).

WILLES, J.—I am of that opinion. The serving the rule for a special jury after the previous delays, and serving it so lately, could only have been for delay, and was an abuse of the process of the Court.

The cause then proceeded. In the course of the case for the plaintiff,

Turner was called on to produce the evidence taken by him under a commission, but he declined, until his fees thereon were paid; and

WILLES, J., after consulting some of the other Judges, held that he was justified in claiming his lien.

Ultimately the cause ended in a

Nonsuit.

(*a*) The C. L. P. Act, 1852, sect. 111, provides, that where the *defendant* gives notice of his intention to try the cause by a special jury, and the *venue* is in London or Middlesex, the Court or a Judge, if satisfied that the notice is given for the purpose of delay, may order that the cause be tried by a common jury. This, however, only affirms the *principle* on which the learned Judge acted—that the Court will not allow an abuse of its process.

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Court of Queen's Bench, Guildhall, coram Cockburn, C. J.

ALEXIADI AND ANOTHER *v.* ROBINSON.

London Sittings.

In an action by the consignees of goods against shipowner for non-delivery of goods according to bills of lading, in which there was a condition that the goods should be taken from the ship by the consignees *immediately* the ship was ready for discharge, and that otherwise they would be *landed or* put into craft at the merchant's risk and expense, and the goods having been landed at a dock the day after the ship was ready for discharge, but after the consignees were ready to receive on payment of freight, and the goods having been detained for some time for dock charges, payment of which was refused:—*Held*, that it was for the jury whether the consignees had complied with the condition, or whether, if not, the defendant had gone beyond it in landing the goods, but that, even if the plaintiffs were entitled to recover, yet they might have received the goods on payment of a small sum under protest, they would not be entitled to recover full damages for the delay, as their proper course was to have paid the disputed sum under protest, and then sued to recover it.

ACTION by consignees of goods, against shipowner, for non-delivery of goods, according to bills of lading. The first count was in detinue. The second was for conversion. The third count stated that the plaintiffs caused to be delivered to the defendant at Smyrna, to be carried by the defendant for them, on board a ship of the defendant, from Smyrna to London, and there to be delivered by the defendant to the plaintiff for freight payable by them or their assignees on delivery.

Averments, of the arrival of the vessel, of plaintiffs' readiness and willingness to pay freight, and of the lapse of a reasonable time.

Breach, that the defendant did not deliver the goods, but neglected and refused so to do, whereby the plaintiffs lost the goods, and were prevented from selling them and realising profits, &c. And the plaintiffs claimed a *return* of the goods.

Pleas (to the first counts): not guilty and not possessed, &c.

To the special count, denial of the bailment of the breach, and of plaintiffs' readiness to pay freight.

7. To the same count, that the plaintiffs were holders and indorsees of a certain bill of lading, by which the goods were to be taken from the ship by the consignees *immediately* the vessel was ready for discharge; or otherwise they would be landed or put into craft by the master

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or the ship's agents, at the merchant's risk and expense; the ship's responsibility to cease when the goods were discharged from the ship's deck.

Averment, that the goods were not taken from the ship by the consignees, in accordance with the condition, whereupon, in pursuance thereof, they were landed by the master and ship's agents, into a warehouse of the dock in which the ship was then discharging, and there placed by the master and agents in safe charge of the owners of the dock, to be taken care of and delivered to the consignees of the same. And that the defendant and the owners of the dock were ready at any time to permit the plaintiffs to take the goods on payment of the freight.

Replication, that the plaintiffs were ready and willing to take the goods from the ship, immediately she was ready to discharge, and before the time when the defendants were entitled to land the same or put them into craft, but that before they were so entitled, they refused to deliver the goods. Issue.

The bills of lading, (bearing the condition stated in the special plea,) were indorsed to Kearns and Co., wharfingers and warehousemen, the real plaintiffs.

The ship's agents were Smith and Co., who had before unloaded cargoes of Kearns and Co. at the docks.

On the 22nd January the ship arrived at the docks. About eleven o'clock in the forenoon she was at her moorings, and began to discharge about noon, but it did not appear that any of the plaintiffs' goods were unloaded on that day.

Kearns and Co. were not aware of the ship's arrival until about two o'clock on that day, and could not get the Custom-house clearances until about three. As it would have taken an hour to get a cheque for the freight cashed and pay it to the agents, and get back to the docks, which closed at *four*, nothing more was done on that day; but Kearns and Co. wrote to the ship's agents, telling them

that next morning they should be at the ship to pay the freight and receive their goods into their craft.

The ordinary hours for discharging cargoes at the docks in winter were from nine till four.

On the 23rd January, however, the ship began to unload as early as seven. It did not appear whether any of plaintiffs' goods were unloaded before Kearns arrived. At half-past nine he came to the dock quay where the ship was unloading, brought his craft alongside ready to receive the goods, produced the bills of lading to the master, and tendered 250*l.* in cash for the freight, the total amount of which as claimed was less than 240*l.*, and the real amount of which ultimately turned out to be 220*l.*

The master refused to receive the freight or deliver the goods, without the orders of the ship's agents, who had no one else there to receive the freight.

At that time the plaintiffs' goods were being unloaded on the quay, and in spite of Kearns' protest they continued to be so unloaded. Shortly afterwards, however, the ship's agents sent to Kearns and Co., offering to deliver the goods on payment of freight at *estimated* weights. To this Kearns and Co. assented, the unloading ceased, and the goods which had *not* been landed, and *some* of those which *had* been were put on board the lighters of Kearns and Co., they paying an estimated freight. Next day, on the 24th January, Kearns and Co. wrote to the ship's agents that they were paying freight in excess, declining to pay longer on an estimated freight, and requiring that the rest of the goods should be *weighed* for freight. Of this no notice was taken.

On the 29th January, plaintiffs' attornies wrote to the defendant, the *shipowner*, demanding the goods, and offering to pay the freight. Of this no notice was taken.

On the 6th February, Kearns and Co. wrote to the superintendent of the docks demanding the goods, and he

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replied that he could only deliver them on production of the ship's agents' release and on payment of dock charges.

On the 9th February, the *defendant*, the *shipowner*, told Kearns and Co. that they could have the goods on payment of the *freight*. On the same day, Kearns and Co. demanded the goods of the superintendent of the docks, who, however, referred them to the ship's agents.

On the 11th February, Kearns and Co. demanded the goods of the ship's agents, who said that Kearns and Co. could have them on payment of *freight*. Kearns and Co. asked what the freight was, and Smith and Co. said *they knew*. This Kearns and Co. denied, and required that the goods should be weighed. On the same day Kearns and Co. wrote to Smith and Co., that they were ready to pay whatever was required, and that though they had asked that the goods might be weighed, they would, if that were refused, *pay whatever was claimed*.

On the 14th February, Smith and Co., the ship's agents, sent the freight notes, showing what freight remained due, and on the same day Kearns and Co. tendered the amount to their clerk, who from some misapprehension refused to receive it. On the same evening, however, Smith and Co. sent a letter to Kearns and Co., enclosing an order on the dock company to deliver the goods to Kearns and Co. "free of charge," on payment of freight only.

This letter, however, was not received until the next day, and on that day, *before* it was received, the writ in this action issued.

The goods had not been received. The dock charges would have come to less than 10*l*.

[In the course of the plaintiffs' case, when the main facts of the transaction had appeared in evidence,

COCKBURN, C.J., said:—The goods having been delivered up and the charges waived, there is really no substantial claim remaining. The action cannot be grounded on conversion, nor are the goods now detained; and, as to the

special count, there can hardly be real damage. The charges claimed were trifling in amount, and the proper course would have been to pay them under protest, and bring an action to recover the money as paid under duress of goods (*a*), and so raise the question of the lawfulness of the charges. But it does not seem to be an admissible course to refuse to pay the money and then sue for all the damage caused by the delay in the delivery, when the delivery might have been obtained immediately on payment of a trifling sum of money.]

On the part of the defendant, evidence was given of a usage that cargoes of fruit especially, coming by steamers, should be discharged immediately the vessels were ready to discharge, and discharge on the dock quays, if the consignees were not there with their craft ready to receive the goods. And that it was for the consignees to discover when the ships were about to arrive, and be ready to receive the cargoes so soon as the vessels were ready to discharge. And the ship's agents were called to prove that they knew the day *before* the ship arrived, that she was *about* to arrive, and that it was known also at Lloyd's. Moreover, they proved that for several seasons their ships had unloaded at the London Docks, where *this* ship discharged. On the part of the defendant, it was contended that Kearns and Co. were too late according to the condition in the bills of lading.

On the part of the plaintiffs, it was contended that Kearns and Co. were in time with their tender of freight on the 23rd, *their* goods not having then been unloaded, and that the ship's agents were in default in not having any one at the ship to receive the freight at that time.

At the close of the case,

COCKBURN, C. J. (to the jury).—The great question is, whether the condition in this contract, that the goods

(*a*) *Ashmole* v. *Wainwright*, 2 Q. B. Rep. 837.

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shall be taken from the vessel *immediately* she was ready to discharge, has been satisfied or not?—for, if not, then the defendant was to be at liberty to land the goods at the expense of the consignees. And the defence is, that the condition was *not* complied with, and that therefore that course was taken.

The first point is, what is the effect of the word "immediately" here? Under ordinary circumstances, when a man is called upon by a contract to do an act, and no time is specified, he is allowed a *reasonable* time for doing it; and what *is* a reasonable time may depend on all the circumstances of the case. But here the word used being "immediately," it implies that there is a more stringent requisition than what is ordinarily implied in the word "reasonable"(*a*). Still, it must receive a reasonable interpretation, so far that it cannot be considered as imposing an obligation to do what is *impossible*.

For instance, it could not be reasonable to require that the consignee should have craft ready by day and by night, and, if the vessel arrived in the night, no doubt it would be deemed sufficient to have the craft ready at a reasonable hour the next morning. And again, there must be time to receive the necessary documents and make the necessary entries at the Custom-house, and the like. Such is the interpretation which, apart from any evidence of actual usage, you probably would be disposed to put upon such a contract (*b*).

In this case, however, it is sought, by extrinsic evidence, to give a precise meaning to the term, and it is contended that, by the practice universally prevailing in cases of such contracts as this, the term "immediately" must be taken to mean, that whenever the ship is ready to dis-

(*a*) See *Hyde* v. *Watts*, 12 M. & W. 254.

(*b*) See *Startup* v. *Cortazzi*, 2 C., M. & R. 165, as to tender of goods at a reasonable time, and not by night.

charge, the merchant must be there with his craft ready to receive the cargo.

At first sight that might appear to be unreasonable (*a*), the time of arrival being as uncertain as navigation by reason of the weather, the winds, or the tides necessarily must be, and the shipowner receiving earlier intelligence from the master of the expected arrival than the merchant is likely to have. But then, on the other hand, it is to be borne in mind that this condition is inserted in cases of consignments of cargoes perishable in their nature, such as fruit, and requiring to be cleared quickly (especially when conveyed by steamers); and that the shipowner or master cannot know to whom the bills of lading have been assigned. And perhaps, therefore, practically, it is not unreasonable in such cases, that the merchant, making use of such means as he may have for hearing of the arrivals of vessels, should be bound to get his papers and his entries passed, and have his craft ready alongside the ship when she is ready to discharge. Such is the usage which has been given in evidence, and it is for you to say, whether it has been made out, and whether you think it reasonable.

The first question, then, being, what is the construction of the term used, whether with reference merely to what is reasonable *or* with reference to the alleged usage? The next question is, whether the plaintiffs complied with it? It is contended for the defendant, that the consignees were bound to have been ready when the ship began to discharge, at noon, on the first day. But it does not appear that any part of the plaintiffs' goods were discharged on that day, or the next morning, before the consignee came. The unloading commenced two hours before the *regular* time, of which he was not bound to be aware. And again, the ship's agents had *notice* that he was coming to tender

(*a*) *Vide Paxton* v. *Courtnay, ante*, p. 131.

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the freight and receive the goods, and it is for you whether the ship was not being unloaded out of the regular course, and whether, on the whole, the consignee did not comply with the condition. And even, assuming that he did *not* strictly do so, and was *not* at the ship so soon as he should have been, it is for you to say whether the defendant, or the ship's agents, took the course which he was entitled to take under the circumstances, in having the goods landed, when the consignee was ready to receive them.

Supposing that you consider that the ship's agents were *not* justified in taking that course, and therefore that the plaintiffs are entitled to recover, the question remains, to what amount of damages are they entitled? The *real* plaintiffs are Kearns and Co., who were entitled to receive the goods. Part *were* received, and the rest *might* have been received on the day the writ issued. Indeed, the whole might have been received on payment of the petty sum claimed for dock charges, which might have been paid under protest, and recovered back, if not justly due. And, although it is true that the market had fallen in the meantime, and that, ordinarily, the parties entitled to receive the goods might recover the loss of profit accruing from the fall in price; yet it is for you to consider whether the plaintiffs might not have obtained the goods at once on payment of a very small sum, and whether, if so, they are entitled to claim the full damages which they might otherwise have justly recovered. The freight could have been ascertained by them, and the freight and charges tendered. If the goods had then been refused, no doubt the plaintiffs would have been entitled to the full amount of damages; but, doubtless, the goods would have then been delivered, and the injury arising from the delay would not have ensued. As it is, it is for you to say whether the delay and injury were not brought about partly by the course taken on the part of the consignees.

The jury found the *usage* as set up by the defendant;

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but found the other matters in favour of the plaintiffs, and damages 10*l.*; and thereupon,

Verdict for the plaintiff for 10*l.* on the third count, the goods to be given up to the consignees.

Lush and *Aspland*, for the plaintiffs.

Bovill, *Hawkins*, and *C. E. Pollock*, for the defendant.

Court of Queen's Bench, Guildhall, coram Blackburn, J.

BURLAND *v.* NASH (*a*).

Michaelmas Term.

Monies, paid *generally*, cannot be appropriated by a creditor without the *consent* of the payee, to a debt, for which he is not responsible.

ACTION to recover 100*l.*, balance of an account for goods sold and delivered.

Pleas: never indebted, and payment.

Shee, Serjt., and *Griffits* for the plaintiff.

Joyce and *Cutbill* for the defendant.

The question in the cause was, whether a debt of 100*l.* due from the father of the defendant, and which had been brought into his account, could be recovered by the plaintiff under the circumstances.

For the plaintiff, it was proved that the defendant took to his father's business, of a fish dealer, in November, 1855, and continued to deal with the plaintiff, fish factor, from that time. That the course of business was to send in weekly invoices: that the first invoice charged the father's debt, 102*l.* 6*s.* as a balance due, and the invoices for two years continuously carried in the account; the invoices, however, being made out simply to "Mr. Nash."

In May, 1857, the account stood thus, and it was proved that at that time the defendant paid 16*l.* 3*s.* 6*d.*, "in order to make an even balance," and that he promised to pay the balance.

(*a*) Ex relatione Joyce.

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From that time the invoices were discontinued, the defendant paying ready money.

Promises by the defendant to pay "the balance" were proved by two witnesses, and upon this evidence (*a*).

Joyce, for the defendant, submitted that there was no case. As a matter of law, no doubt, where several debts are due to a creditor, and money is paid generally, he can appropriate it. But there is no case which decides that a creditor can appropriate monies paid by his debtor to the debt of a third party, and that is this case, for there is no evidence of any *authority* to appropriate.

Shee, Serjt., for the plaintiff.—This is like the case of a partner leaving a firm without notice. It must be taken that the defendant being charged with the father's debt, and that being continued as a debt against him, and the payment being credited generally, coupled with the promises to pay, he imputed that the monies paid should be taken in discharge of his father's debt; if he did they were well appropriated.

Joyce, in reply.—The defendant never paid more money than the goods he received amounted to. He is not responsible for the mode in which plaintiff keeps his accounts.

BLACKBURN, J.—If the jury are of opinion that the money was paid in discharge of the father's debt, and the defendant intended that the plaintiff might so appropriate it, and that he did so, there being no money left to meet the defendant's debts, the plaintiff must succeed.

Joyce then called the defendant, who denied that he ever *assented* to the appropriation, or consented to pay the balance.

BLACKBURN, J., left that to the jury (*b*).

Verdict for defendant.

(*a*) On which it will be observed, it appeared that the *son* was never responsible *at all*; so the case was unlike those in which there has been a legal liability barred by the statute.

(*b*) *Vide Allaway* v. *Harris*, 29 L. J., Exch. 214, a very similar case, decided in the same way.

1861.

Court of Queen's Bench, Guildhall, coram Cockburn, C. J.

GEORGE *v.* GODDARD (*a*).

Michaelmas Term.

Words having been spoken at a meeting for the election of an overseer, imputing to a person put up for re-election that he had misappropriated parish monies while holding the office before:—*Held*, that the occasion was privileged, but that whether the words were so would depend, not merely on whether they were wilfully false, but whether on the face of them they were so far beyond the occasion that the jury might fairly infer the occasion was merely *made use* of for the purpose of personal malice.

SLANDER. The declaration alleged that the plaintiff was an overseer of Coleshill, that a meeting was held there for nominating persons from whom the magistrates might select overseers for the ensuing year, that the plaintiff was proposed as a fit person, and that thereupon the defendant falsely and maliciously spoke and published of the defendant, and of him in his said office of overseer, the words following, that is to say:—"I protest against Mr. George's name being on the list of persons nominated, on the grounds that he has misappropriated the funds of the parish, and has applied them to a private use." The defendant meaning thereby that the plaintiff, whilst serving the said office of overseer of the poor of the said parish, had defrauded the said parish, by fraudulently applying the monies received by him as such overseer, for the use of the said parish, to his own private purposes.

Pleas: 1. Not guilty.

2. Justification.

It appeared that Amersham and Coleshill had the same church, but maintain their poor separately; that proceedings were taken for constituting a common burial board and burial-ground for the two places, which, notwithstanding the resistance of many persons in Coleshill, were successful. An attempt of the burial board to obtain contributions from Coleshill was, however, unsuccessful, and a mandamus to compel the defendant to pay the money out of the poor rates, led to the trial of issues of fact at Aylesbury and to a special case. The plaintiff borrowed money on his note for the purposes of the trial, and paid it back out of the rates. The borrowing, repayment, and the resistance to the writ were all without

(*a*) Reported by D. D. Keane, Esq.

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the sanction of the vestry; and before the vestry meeting, at which the words were spoken, the poor law auditor had surcharged against the plaintiff one of the sums paid by him to liquidate the loan, although he afterwards allowed it. The plaintiff's evidence was that the defendant had used the words in the declaration as equivalent words. The defendant's case, as suggested by the cross-examination, was, that the defendant used the words except "has applied them to a private use," and that his language only pointed at an expenditure of parish monies, not authorized by the vestry. Both parties agreed that the defendant, when he uttered the words complained of, spoke in high terms of the plaintiff's private character, and described him as honourable and punctual in his dealings.

M. Chambers, *Ballantine*, Serjt., and *T. A. Russell*, for the plaintiff.

O'Malley and *Keane* for the defendant.

At the end of the plaintiff's case,

O'Malley applied for a nonsuit.—This was not only a privileged occasion, but a privileged statement in itself. The law requires express malice to overcome the privilege; and when the occasion is privileged, and the statement, in its matter, privileged also, the law requires evidence of malice *aliunde*, that is, other than the very words complained of.

COCKBURN, C. J.—I shall tell the jury that the occasion was privileged; but that the statement though made on such occasion will be unprivileged, if the making it was a malicious abuse of the occasion. They have a right to ascertain the real meaning and intention of the plaintiff in the words complained of, notwithstanding other words of courtesy and kindness.

If the defendant simply meant to censure the conduct of the plaintiff as overseer, in relation to the law proceedings, and to the money borrowed for them, and repaid out of

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the rates, his statement was privileged by the occasion. If, on the other hand, he availed himself of the opportunity afforded him, by the meeting of the ratepayers, to bring forward a charge against the plaintiff, not merely of exceeding his duty, but of corruptly violating it, by applying the parish money to his own private purposes, the statement was not privileged, nor was it protected by the occasion. If the language of the defendant was entirely disproportioned to the circumstances under which he would be privileged by the occasion, the jury would be justified, I think, in inferring malicious motives, for they only would be the motives which would prompt such language; but, if it be plain to the jury that the defendant's language described only the excess of duty without imputing private corruption, then I shall tell them, the occasion and statement were privileged.

Evidence was then given on the part of the defendant, and eventually the plaintiff submitted to a

Verdict for the defendant.

STOKES AND OTHERS v. THE EASTERN COUNTIES RAILWAY COMPANY (a).

1860.

Michaelmas Term.

In an action against a railway company for an injury alleged to have been caused by the negligence of the defendants or their servants, the negligence suggested being the use of engines or machinery with

ACTION by the representatives of a gentleman of property who had been killed while a passenger in one of the company's trains, in consequence, as the declaration alleged, of the carelessness and negligence of the company in managing and conducting the engine.

Plea: not guilty.

E. James, *Huddleston* and *Mills* for the plaintiffs.

(a) *Vide Ford* v. *The Eastern Counties Railway Company, post.*

a flaw or defect which ought to have been observed, the question is not whether, according to evidence of a scientific and speculative nature, it might *possibly* have been detected, but whether *practically* and by the use of *ordinary* and *reasonable* care it ought to have been observed.

1860.

STOKES and Others v. THE EASTERN COUNTIES RAILWAY COMPANY.

Bovill, Ballantine, Serjt., *Bushby* and *Kaye* for the defendants.

The immediate cause of the accident was, the breaking of the tyre of the near leading wheel of the engine. The alleged negligence was, in using a tyre which was defective, either by the fault of the company originally in the welding of it, or which had become defective, in the course of its use, so as to have become visible or capable of being detected on proper examination, and also in not using sufficient break-power or not properly applying it.

There was evidence of a longitudinal flaw in the original making of the tyre, and also of a transverse flaw or defect in the *welding*.

It was agreed, however, that the *first* defect was *not* the cause of the accident, and that the true cause was, the giving way of the iron at the other or transverse flaw—a flaw in the *welding*. But it was suggested that the former or longitudinal flaw ought to have attracted attention to the tyre, as a sign of weakness.

And it was suggested also that the use of the tyre after it had been worn down to a certain degree of thinness was negligence which had led to the catastrophe. The *thinness* of the tyre of course was apparent, and the evidence was contradictory as to whether it was dangerous. As to whether the other flaws or defects were *visible*, there was a great contest of testimony. The evidence that they were so was scientific and speculative. The evidence that it was not so was practical and positive. The accident occurred on the 26th of February. The last time the tyre was "turned" was in October, and the wheel had ran constantly since without any sign of weakness which had *actually* been seen, or was proved to have been actually visible.

The trial lasted six days.

At the close of the case,

COCKBURN, C. J., thus summed it up to the jury.—The

question is, whether the breaking of the tyre resulted from any negligence in the defendants or their servants, for which they are responsible? First, as to the defects in the tyre. They did not manufacture the *iron;* the defect in the *iron* itself was unknown to them, and it is not said that they are responsible unless the flaw had become, in the course of use and time, *visible.* Of this there is no positive evidence but such as is purely speculative. It is for you to say whether you are satisfied with it. You must deal with a case of this kind as *practical* men. You are entitled to expect at the hands of a railway company all that skill and care and prudence can do to protect the public against danger and accidents, but you must carry that principle into application as reasonable men. It is one thing for the microscopic eye of science, with the aid of instruments and measurements, to detect inequalities or pick out flaws, but the practical working of railway business is quite another thing, and you cannot expect that a railway company shall be from time to time measuring with accurate scientific instruments, or taking down scientific persons to see if there is a little inequality here or there. The business of railways and of life could not go on if this were required. You must, therefore, look at the matter in a reasonable and practical point of view, and judge if the indications were such as a competent railway servant should and ought to have seen?

It is indeed admitted that the transverse flaw—the flaw in the welding of the tyre—was the cause of the accident. It is said that if any part of the machinery used by the company has proved defective, the company are bound to show its history. But their not being able to do so is not in itself evidence of negligence. And this part of the case involves two questions. Was the tyre welded by the company? Was there negligence in the welding of it? Can it in all cases be concluded that, because there is a defect in the welding, that defect implies negligence in the party

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who has welded? If you are of opinion that the company welded the tyre, and that there was negligence in the welding, then, as the defect in the weld was the cause of the accident, you can trace it clearly and connect it with negligence of the company, and the plaintiffs would be entitled to the verdict.

If they are not responsible for the *existence* of the flaw, then comes the question whether it was *visible?* The evidence that it was *not* so is *positive,* and it is the evidence of the men who had charge of the engine and examined it the night before the morning on which the accident occurred. If you are of opinion that the flaw or crack had become *visible* prior to the accident; that upon careful examination, not with the aid of highly scientific authorities and scientific instruments, but on an *ordinary, reasonably proper and careful* examination, such as all feel ought to be made before engines are used, on which the safety of a whole train may depend, this flaw might have been discovered, and that either the examination did *not* take place, or, if it did, and the flaw was discovered, but the man, with careless disregard of his own safety and the safety of others whose lives and limbs might be involved, treated all this with supine or reckless indifference, then undoubtedly there is negligence established for which the company are and ought to be responsible. It cannot be denied that the company are bound to have these examinations conducted carefully and properly, and to see that the machinery they use are in working order. But unless you are satisfied that the flaw was capable of being detected on such proper examination, you cannot hold them liable on this ground.

Then there arises the question, did the company continue to use the tyre after it had been reduced in strength and substance below the point at which it was proper to use it? This depends on the former question whether the flaw was visible; for if it were, then a reduction of the thickness and

substance of the tyre, which would otherwise have been consistent with safety, would, with reference to the flaw, have been improper. Assuming that the flaw was *not* visible (for if it were it is needless to go further, *that* being evidence of negligence), was there negligence in using the tyre after it had been so reduced in substance? If there was, then, even although they did not know of the latent cause of danger, yet as their negligence gave effect to it, it would be, though not the proximate, yet the efficient cause of the accident, and would be negligence for which they are liable.

As to whether the tyre *had* been reduced to an unsafe thinness, the evidence that it had been was rather scientific and speculative; the evidence that it was *not* so was rather practical. And the general practice in any department of business embracing a large area of practical experience, if found up to a given time to have been unattended with danger, is strong evidence that it is a proper one. And if you think the practice has been as represented, can you say that because in the present instance it turns out that the tyre has been pared down to too great a degree of thinness, that this is evidence of negligence? If, however, you think there was that degree of thinness which made it improper to use the tyre, then you will find for the plaintiffs.

Lastly, even assuming that the accident was not *caused* by negligence of the company's servants, might it have been prevented or mitigated by a better use of break-power? It is not to be disputed, because the universal practice of railway companies is an acknowledgment of its necessity, as a matter of proper caution and care, that break-power ought to be used. Are you of opinion that the absence of a second break-van, or the not putting the single one in the rear, was negligence on the part of the company? You must consider the question as practical men; and if you think that there was a neglect of

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what might fairly and reasonably have been expected from the railway company for the protection of a train, that would be negligence. But then the question would remain whether it conduced to the accident, i. e. in the sense not of having caused it, but of not having prevented it. This depends upon whether, assuming the break-power had been better used, it would have prevented or mitigated the catastrophe.

The jury, in answer to specific questions, found, that there was no evidence that the tyre was negligently welded; that the neglect had not become visible; that there was no negligence in using the tyre after it had become thin; that there was no negligence in not providing better break-power; and that, if it had been applied, it would not have averted or materially mitigated the catastrophe.

Verdict for the defendants.

1862.

London Sittings, Hilary Term.

LINDSAY *v.* LEATHLEY.

An iron steamer, while riding at anchor in an open roadstead, where she had been driven by distress, encountered some severe gales, in which she pitched and rolled a good deal, and some time afterwards, while still there waiting necessary repairs, a hole in her bottom was discovered which might have been repaired; and there being also evidence that some of her rivets were wrenched and some of the iron plates on her bottom "started"—injuries which might either have arisen from straining in a storm, *or* from wear and tear; and the assured having abandoned her and claimed as for a *total* loss, the underwriter paying into court a sum estimated only on a partial loss calculated on the cost of repair:—*Held*, 1. That the plaintiff could only recover for loss or injury proved to have been caused by perils of the seas. 2. That he could not recover as for a constructive total loss; unless, under the circumstances, the captain was justified in abandoning the ship. 3. That this would depend, (1), upon whether the ship could and ought to have been repaired where she was, or, (2), whether she could safely have been taken to some port where she might have been repaired. 4. That the plaintiff could not recover for any injury caused by wear and tear, unless in *consequence* of the ship's *detention* at the place in question by *previous* perils of the seas.

ACTION on a time policy for a year ending 31st of January, 1860, on an iron steam ship, the policy being valued at 3,980*l.*, the ship being valued at 14,000*l.*, and machinery 3,500*l.*, total value 17,500*l.* The declaration averred that the defendant had subscribed as insurer for

150*l.*, and that the ship had been *wholly* lost (*a*) by perils of the sea insured against. Claim, 200*l.*

Plea, payment into Court of 10*l.* 10*s.*

[This sum was calculated at the rate of 7 per cent., which on the total value of ship insured would amount to nearly 1,200*l.* This was paid into Court, on the footing of a *partial* loss, as being sufficient to cover the amount of repairs rendered necessary by reason of injuries caused through perils of the seas.]

In the course of the case,

Lush, for the plaintiff, submitted that the plea admitted that the loss arose through perils of the seas; but

Bovill, for the defendants, contended that it only admitted a loss through perils of the seas, to the amount paid into Court, because on the declaration the plaintiff could have recovered for a partial loss (*b*), and that therefore it was open for the defendants to dispute that the loss was total, or caused by perils of the seas. And

COCKBURN, C. J., so held and ruled accordingly (*c*), that the plaintiff could only recover to the amount of loss or injury proved to have been caused by perils of the seas.

[There were upwards of 100 similar actions against underwriters of the same policy, of which some had been settled, and the rest had been consolidated to abide the event of the present action.]

Lush, *Dowdeswell* and *Lloyd* for the plaintiff.

Bovill, *Honyman* and *W. Williams* for the defendants.

The ship, an iron steamer of 950 tons burden, was built in 1850, and the plaintiff became the owner in 1857.

(*a*) On which plaintiff could have recovered on proof of a partial loss (*Gardiner* v. *Crossdale*, 1 W. Black. 198), and on judgment by default, plaintiff could only have recovered the loss proved. *Ibid.*

(*b*) *Vide supra.*

(*c*) *Vide Perren* v. *Monmouthshire Railway Company*, 22 L. J., C. P. 164.

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In January, 1857, she left England for Calcutta, and from that time was employed in sailing between Calcutta and China until February, 1859, when the present policy was entered into, a time policy for a year. In March she sailed on a homeward voyage, with a cargo of indigo, saltpetre and jute, a species of hemp. At that time it appeared that the mast was rotten, that nearly all the "gear" standing or running were rotten and unsafe, and that the deck required re-sheathing; that the wood-work generally was in a bad state, and the iron-work rusted and corroded. In the first two months of the voyage the vessel sustained some damage, and in May put into Algoa Bay to refit. [Algoa Bay is on the south-east coast of Africa, about 600 miles from the Cape, and about the same distance from Port Natal. It is an open roadstead, the nearest *port* to it being Simon's Bay, distant about 430 miles.] While there, it was found that damage had been sustained, for which 25 per cent. had been paid by the insurers. In July the captain, finding that thorough refitting was necessary, requiring a larger outlay than he thought proper to incur without consulting the owner, went to England for that purpose, leaving the vessel riding at anchor in the open roadstead. On the 2nd and 16th of October heavy gales blew, which sent some vessels on shore, and in the log-book, on the 17th of October, there was an entry that the ship's deck leaked; but no other similar entry occurred, and there was no mention that the ship had "strained." In November the captain returned to Algoa Bay, bringing masts, spars, &c. to the value of 5,000*l.*, and thereupon the repairs proceeded. On the 27th of December the captain's attention was called to a leak, which he said he *saw* "abaft the engine-room, just inside one of the after compartments," and which he described as a hole of the size of a small rivet, ragged in shape, with a crack going from the upper part, and from one of the sides." This hole the captain caused

to be plugged with wood, but he said he saw that the iron plates and rivets in the bottom of the ship were injured; that some of the rivet-heads were off, some near where the hole was, and others under the engines and boilers; and some of the plates were apparently started. The captain at once had the ship surveyed, and the surveyors' report recommended that the cargo should be unshipped, and the vessel "hove down," in order the better to inspect the state of her plates and rivets. The captain then (in February) had the cargo taken out and again surveyed, and the surveyors reported that, from the bad state of the rivets and plates it would be absolutely necessary to have the bottom examined externally, before any opinion could be formed of the ship's seaworthiness, and that she could not go to sea without being hove down and examined. The captain then had her boilers taken out, and advertised for tenders for heaving the ship down. Only one tender was sent, for the sum of 3,000*l.*, which the surveyors advised him not to accept. An offer was made of a hulk for the purpose of heaving down for 1,000*l.*, but this offer also the captain declined, even when it was repeated gratuitously. It appeared from the surveyors' report that the operation of heaving down a vessel in an open roadstead would be attended with great danger, and that was one of the reasons they urged for not accepting the tender. No further survey was made, but the captain applied to Lloyd's agent at Algoa Bay for advice, which was declined. It did not appear that any one there had recommended that the ship should be taken to Simon's Bay, which would have been a safe port.

No attempt was made to take her there, and on the 19th February the captain made his protest of abandonment, and thereupon the hulk of the ship was set up for sale and sold for 200*l.* The captain came home and placed himself in communication with the underwriters, several of whom had since paid, but the greater number had resisted

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the claim for a total loss, and the other actions had been consolidated to abide the result of the present one. The captain, after waiting for four months in this country, during which time he had not been examined by either party, went abroad, and was there examined by commission.

The great contest in the case was as to the nature and extent of the injury the ship had sustained. The strength of the case for the plaintiff was, that the rivets were torn and wrenched and the plates loosened by reason of straining in the heavy gales of October, and it was not, on the part of the plaintiff, denied at the end of the case, that the *hole* alone might have been repaired; at all events, sufficiently so to have reached Simon's Bay in safety. On the part of the defendants, the loosening of the plates and rivets was denied, and it was disputed that there had been any symptoms of straining. The purchaser of the ship was examined on their behalf, and stated that the only injury was the hole, and that it could have been repaired for 100*l.* or less.

But it did not appear that *he* had attempted either to repair or to remove the vessel. The witnesses for the defendants placed the hole at the bottom of the well-hole, and ascribed it either to the action of the sounding-rod or to the corrosive effect of bilge-water. But no satisfactory cause was assigned for the hole by the evidence on either side. And at the *close* of the case it seemed to have become of little importance, seeing that it was not *then* disputed that it might have been repaired. The witnesses for the plaintiff relied chiefly on what they alleged to have been the wrenched state of the rivets and plates, as at once showing a deadly injury to the vessel, and one which must have been caused by straining and so by perils of the seas.

The witnesses for the defendants denied that the rivets and plates were wrenched, though they stated that they were *worn;* and they on the other hand insisted that the *hole* could not possibly have been caused by straining, and

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that there was nothing which might not be ascribed to wear and tear or to the causes before mentioned. They particularly urged that one of the sure signs of straining was leaking, and that there was very slight evidence of leaking, and none which might not be accounted for by a general weakening of the vessel caused by wear and tear and *general* want of repair. And above all, that it was impossible that there should be strong straining in the plates beneath the engine-room, when there were no signs of it elsewhere.

On all these points there was great contrariety of opinion and a great body of contradictory evidence. The trial lasted five days.

At the close of the case,

COCKBURN, C. J. (to the jury).—This is one of the most important insurance cases ever tried. It raises the question, under what circumstances a captain is entitled to abandon a vessel, so as to give the owner a claim upon the underwriters for a total loss? There are two great points for your consideration:—First, whether the captain was justified in abandoning the vessel? Secondly, whether the damage which she had sustained arose from "perils of the seas?" The plaintiff must satisfy you on *both* those points.

Upon the first point, the question will be, in effect, what would a prudent owner, uninsured, have done in similar circumstances? or, in other words, what would the insurers have done, or desired to have done, had they been present?

There are two cases in which a captain is justified in abandoning a ship, and claiming as for a total loss (though the ship remains in *specie*, and has not been destroyed or wrecked), i.e. what is called a *constructive* total loss. One case is, where the vessel has been so damaged that she cannot proceed, with a due regard to the safety of the vessel, or of those who have to navigate her, and repairs

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are physically impossible at the place where she is. The other case is, where the repairs, though possible, will, from their extent, cost so large a sum that the value of the vessel, when repaired, will not be equal to the costs of the repairs. This latter case, however, does not here arise; and the case for the plaintiff is, that the repairs from the circumstances were physically impossible. And the question you will have to consider is, whether this was so? The first question will be as to the extent of the damage: the next, what were the means of repair?—First, as to the extent of the damage. It has been ascribed partly to the hole in the ship's bottom, but chiefly to the straining of the rivets, and the consequent looseness of the plates. The evidence as to the leak or hole seems clearly to show that it could have been repaired, and the counsel for the plaintiff in his reply did not dispute it. The great question, therefore, is as to the other head of damage: was the ship *strained*, as alleged on the part of the plaintiff, so as to loosen her rivets and plates? The surveyors certainly recommended that the ship should be "hove down," to see the state of the ship's bottom; and one of their reports mentions leaking, and speaks of the "bad state of the plates." That, however, is consistent with the theory of the defendants—that the leakage, except that which arose from the hole, arose from the general weakening of the vessel owing to wear and tear. Beyond all doubt the case must turn on the state of the rivets and plates; and there is the evidence of the captain that he saw that they were injured from the place where the hole was as far as to the boilers, and under the engines and boilers. But another of the plaintiff's witnesses described the plates as "worn," and said that the state of the rivets might have arisen from causes going over some months, and did not ascribe their state to *straining*. It does not appear clearly that any of the rivets were started, though there was certainly some evidence that they had, and that this would so loosen the

plates as to let in water. There is also some evidence that this could only be ascribed to straining of the vessel in a storm, and that some of the rivets were *off*. Next, as to the means of repair. Now there is very strong evidence that the plates could not be repaired, nor indeed their state fully known without heaving down the vessel, and that this was an operation which could not have been safely effected at Algoa Bay; that it could not be done without enormous expense and very great peril and risk. The surveyors advised the captain not to accept the *tender*, but it will be for you to say whether he ought to have at least availed himself of the free offer of a hulk for the purpose? or whether he ought not to have taken the ship, or try to take her to Simon's Bay? No doubt this must greatly have depended upon the degree of damage done to the ship. But suppose you come to the conclusion that the ship required *thorough* examination and repairs, and that such examination and repairs might have been obtained at Simon's Bay, are you of opinion that the captain was right in abandoning the vessel without taking her there? If the vessel required effectual repairs, no doubt they could not have been done at Algoa Bay, where it could have been impossible to keep the ship hove down, without great risk of her going to the bottom. So that if the ship required such repairs, they could not have been done at Algoa Bay; the question, therefore, whether the captain should have taken the ship to Simon's Bay depends partly on the extent of the damage; partly, also, on the *means of taking* the ship there, and on the means of repairing her there. It is for you to consider whether he should have tried to have her towed there, and whether, if he got her there, the repairs required could have been done. It is for you to consider whether it was unsafe to take her to Simon's Bay, so as to leave the captain *no alternative* but to abandon her where she was. It is of great importance that captains and owners should

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understand that vessels are not to be *lightly* abandoned, but that it is the duty of the captains to use an honest energy, and all possible means to bring the vessel on her voyage, and that they are bound to do the best, which a prudent owner, uninsured, would have done under the circumstances. Did the captain, in this case, do rightly, and in the exercise of a *sound* discretion, in abandoning the ship? If so, the underwriters are liable, if otherwise, they are *not* so. Observe, that the question is, whether the captain acted in the exercise of a *sound* discretion; not merely whether he acted *honestly*. Are you satisfied that he acted rightly, in the exercise of a *sound* discretion under all the circumstances, and after doing all that he ought reasonably to have done?

But supposing the captain was not wrong in abandoning the vessel with reference to the interests of the owner, the question remains, whether the damage which the vessel had sustained was caused by perils of *the seas*. The case for the defendants is, that the state of the rivets and plates arose from wear and tear, for which the underwriters are not liable. Whether the injuries arose from external or internal causes, they may have been the result of wear and tear. Ships will wear out, and it is not against wear and tear that the underwriters insure. Therefore, if some of the plates and rivets were *worn* off otherwise than through the ship's being strained by the winds and waves, then, if it were by striking against a rock, it would be by perils of the seas; if by the action of the sounding-rod, or by the corrosive effect of the bilge-water, it would not be so. Observe, the case for the defendants supposes that the only leak was in the well-hole; but the case for the plaintiff, that there was leakage arising from external causes, may equally be true, wherever the leakage was elsewhere. Certainly there is *evidence* for you that the damage was caused by perils of the seas; and, lastly, assuming that it was so, was it a partial or a total loss?

There are, therefore, two main questions for you. First, whether, (with reference to what a prudent owner, uninsured, would have done,) the damage which the ship had sustained, and the circumstances in which she was placed, were such as to justify the captain in abandoning her? Next, whether, if so, the damage was the result of perils of the seas?

Under the second head several questions arise—

(1). Could the ship have been repaired at Algoa Bay so as to proceed, if not to England, at all events to Simon's Bay?

(2). In the latter view, then, having regard to the means of repair at Simon's Bay, ought the captain to have taken the ship there?

(3). Was the damage the result of wear and tear or perils of the seas?

(4). If you should find that it was the result of wear and tear, was it while the vessel was lying moored at Algoa Bay *after* the month of June? That is, in consequence of the detention there.

Verdict for the plaintiff (*a*).

(*a*) COCKBURN, C. J., stayed execution; but this might have been to afford either party an opportunity of moving for misdirection. *Semble*, there was evidence sufficient to sustain the verdict. In Easter Term *Bovill* moved, as against evidence.

LUCKOMBE AND ANOTHER *v.* ASHTON AND ANOTHER.

Sittings after Hilary Term.

An action maintained against the medical officers of a dispensary, (who were also members of the managing committee,) for drugs supplied for the dispensary, on the orders of others of its medical officers, on behalf of the committee, and with the knowledge of the defendants, the jury being directed that the defendants would be *personally liable* unless they made the plaintiffs understand that they were to look only to the funds of the institution.

THIS was an action for drugs supplied to a dispensary during and between the years 1852 and 1856; the amount claimed being a balance of 417*l.*, after giving credit for a sum of 30*l.* paid, on account, by the defendants.

Pleas: never indebted, and the Statute of Limitations.

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LUCKOMBE and Another v. ASHTON and Another.

Cleasby and *Field* for the plaintiffs.

Lush, *Parry*, Serjt, and *Sharpe*, for the defendants.

The dispensary had been established in 1851 by voluntary contributions and subscriptions, and the defendants put themselves forward as the medical officers, and appeared to have been, in fact, the principal promoters. They were not elected or appointed by any body of subscribers, but they, in effect, appointed themselves, and they concurred in appointing others, who attended to the ordinary internal management, they themselves acting as *visiting* medical officers. There was a committee of management formed by all the medical officers, of which the defendants continued to be members until 1857. There was a banker's account opened in 1854, upon which, by a letter signed by the two defendants, cheques were to be drawn by any two directors, countersigned by the honorary secretary. One of the defendants had been honorary secretary and the other honorary treasurer. Orders for drugs, &c. were written on printed forms, headed "Blenheim Street Dispensary," signed by the resident medical officers on behalf of the committee, and addressed to the plaintiffs, who had supplied all the drugs from the commencement. No orders were produced signed by the defendants, but there was an order-book in which duplicate orders were written, and this book was seen from time to time by the defendants and the other members of the committee, who also saw the banker's book from time to time. It was not denied that the defendants were aware of the course of business, and of the supply of drugs by the plaintiffs on orders written as above mentioned, "on behalf of the committee." Sums had been paid to the plaintiffs on account of drugs supplied in 1851 and 1852; but a balance remained due on the account for 1852. No further payment was made until the end of 1856; and frequent applications were made by the plaintiffs for payment; the defendants replied that

they had no funds of the institution in hand; in answer to which the plaintiffs from time to time suggested a recourse to balls, concerts, fancy fairs, and the like. Resort had been had to such means, and a sum of 400*l.* raised, which, however, had been applied to the payment of a sum of money for the purchase of the lease of the premises, for which the defendants had made themselves, in writing, personally responsible. It appeared that the subscriptions and donations had not left funds available to meet the demand in respect of drugs. In various printed circulars, or appeals, the defendants represented that there was a large *debt* due for drugs.

In January, 1857, the plaintiffs wrote to the defendants a letter, inclosing their account, commencing with a balance due on the account for 1852, and expressing themselves in these terms: "This state of things is at variance with *all business*, and we have decided to decline supplying *your institution* from this year, unless a satisfactory arrangement can be made for an *early payment* for the future, and for a gradual but certain liquidation of the outstanding debt." The defendants thereupon paid 30*l.* generally on account, and signed the following memorandum: "We, the undersigned medical officers, &c. hereby guarantee and engage to pay you for any drugs you shall supply to this institution within one month from the end of the quarter." No further payment, however, having been made on the old account, the plaintiffs, in November, 1861, brought the present action.

For the plaintiffs it was urged that the defendants had never said a word to *negative* personal liability.

For the defendants it was urged that the plaintiffs had never intimated that they *looked* to their personal liability. It was contended, on behalf of the defendants, that the plaintiffs must be taken to have looked to the *funds* of the institution.

The defendants acted all along *gratuitously*.

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COCKBURN, C. J. (to the jury).—It is not disputed that the defendants were aware of the course of dealing, so that they must be taken to have been parties to the orders given to the plaintiffs "on behalf of the committee," of which the defendants were members.

It is not denied that *primâ facie* this would make them liable to the plaintiffs.

The defence is, that though the committee gave the orders, the understanding of the parties was that those who gave the order should not be liable, but that the plaintiffs should look only to the funds of the institution, they knowing that the defendants acted gratuitously and with only casual sources of supply derived from public charity.

Do you see your way to that conclusion? That is, that the defendants were only to be liable out of such funds as they might have in their hands for the purpose of paying for these supplies.

The plaintiffs deny that they supplied the goods on such an understanding. And what is there to show that they did? On the other hand, do not the letters, &c. rather imply the reverse? The engagement entered into in 1857 is for an "*early*" payment for future supplies, not merely for *payment*. There is nothing to militate against the plaintiffs' claim, in the fact that they should have suggested in relief of the defendants some appeals to public charity to raise funds. This was natural enough, knowing, as the plaintiffs did, that the defendants were acting gratuitously, but it is far from implying that they looked only to the funds (*a*). The same remark applies to,

(*a*) *Vide Cross* v. *Williams*, 10 W. R. 302. In that case POLLOCK, C. B., observed, *arguendo*, that officers or managers of dispensaries or hospitals are not liable personally for drugs, &c. supplied to those institutions; but that was said in a case where it was disputed whether there had been any orders by or on behalf of the defendant, and must be supposed to have been meant of similar cases; whereas in the present case there was evidence of a course of dealing, with payments

and accounts for, their so long abstaining from *suing*. As to the Statute of Limitations, the payment by the defendants generally on account takes the whole claim out of the statute.

Verdict for the plaintiffs.

on account and the like, all importing a personal liability. And see *Todd* v. *Emley*, 8 M. & W. 505; 9 Ib. 606, where it was settled, that members of the committee of a club are liable for goods supplied to the club on *their* orders. See also as to the liability of promoters or provisional directors for goods supplied on their orders, or on orders agreed to at meetings at which they attend. *Bailey* v. *Macaulay*, 19 L J., Q. B. 73. See as to liability of a trustee of a coal club, *Wood* v. *Finch*, *ante*, p. 447.

MITCHELL AND ANOTHER *v.* KAHL AND OTHERS.

London Sittings. Hilary Term.

In an action against a broker who had professed on behalf of the owner of a ship to charter her to the plaintiffs, not having authority so to do, and who had requested them to charter themselves some other ship, and they having chartered a much larger ship at a higher freight:—*Held*, that they could not recover from the broker more than the difference of freight on the tonnage of the former ship, if they could have procured one of similar size, or had neglected to give the defendants notice of the substituted ship, so that he might use the surplus freight.

DECLARATION, that in consideration that the plaintiffs would enter into a charter, through the defendants as brokers, with the defendants' principal, one D., as owner of the ship *Wittow*, for a charter on certain terms by D. to load at Riga, &c., they, the defendants, warranted and promised the plaintiffs that they, the defendants, had authority from D. to effect the said charter. Breach, that they had not such authority, whereby the plaintiffs lost the benefit of a ship on such terms, and had to procure a larger ship at a higher freight, &c.

Plea: payment into Court of 75*l.*

M. Smith and *W. Williams* for the plaintiffs.

Shee, Serjt., *Lush* and *Murphy* for the defendants.

On the 5th of May, 1860, the defendants' firm, as brokers, entered into the charter for the ship *Wittow*, belonging to one D. at Riga, to load timber there, on a voyage to Liverpool. The tonnage of that ship was 250

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tons, and she could carry 300 loads. The freight was 19*s.* per load.

On the 19th of May the defendants found that their principal at Riga would not sanction the charter, and they informed the plaintiffs of this, and desired them to charter another vessel.

On the 12th of August the plaintiffs accordingly chartered the *Auguste* at Riga, a ship which would carry 477 loads, the freight being 24*s.* per load.

There was *positive* evidence on the part of the plaintiffs that they could not have got a smaller vessel.

There was some proof on the part of the defendants that there were a great number of vessels at Riga, but no positive proof that the plaintiffs could have got a smaller one.

On the 5th of August the *Wittow*, the ship originally chartered, sailed from Cardiff for Riga, so that she would not have got to Riga before September.

The *Auguste* was a month loading at Riga, during August and September.

The plaintiffs did not give the defendants any notice of the substituted charter. The *post* would have taken about a month to have brought an answer; but there was a telegraphic communication, by which an answer could have been got in a day or two. It did not appear that the defendants could or would have used the surplus space on board the substituted ship; nor did it appear that they could *not* have done so.

In October the *Auguste* reached Liverpool, and the defendants were informed of the tonnage of the substituted ship, and compensation was claimed, on the footing of the difference of freight, not only on the tonnage of the *first* ship, but on the whole tonnage of the *substituted* and larger vessel, giving credit for the profit on the sale of the surplus cargo carried.

The defendants disputed their liability for more than

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the difference of freight on the tonnage of the first ship, which they paid into Court.

COCKBURN, C. J. (to the jury).—The *utmost* which the plaintiffs can claim is the difference of the freights on the *whole* of the cargo of the substituted ship, giving credit for the profit on the surplus cargo carried. To *that* they are entitled, if you are satisfied that they could not have found a smaller ship; for in that case they could not get the 300 tons carried, except at the cost of the *freight* of the 477 tons; and it was for the defendants' freight that the space should be used (as the freight would have to be *paid*), so that they might have the benefit of the profit on the sale of the surplus cargo carried. If you think either that the plaintiffs *might* have got a smaller vessel, *or* that they improperly neglected to give the defendants notice of the substituted charter, so as to give *him* the option of using the surplus space, you may find for the defendants; otherwise, for the plaintiffs, for the sum claimed.

Verdict for the defendants.

Court of Queen's Bench, Westminster, coram Cockburn, C. J.

Middlesex Sittings. Hilary Term.

HANCOCK *v.* CASE.

Where an underwriter, in discussing with an agent of the assured a claim on his part as for a total loss, made a statement purporting to be founded on a letter of the assured which he professed to have seen, implying a design to make such a claim dishonestly, no such letter having been written:—*Held*, that the occasion was privileged, but whether the communication was so, would depend on the motive with which it was made and whether there was a mere mistake or a statement wilfully false.

SLANDER. There were two counts, both charging that the defendant had spoken and published of the plaintiff, as a merchant, that he had written to one Munns, his agent for a certain ship of his, that if the underwriters would not accept the abandonment of the ship, it should be sent to the Mauritius and there condemned.

Special damage: that by reason thereof the underwriters had been deterred from settling with the plaintiff in respect to his loss of the said ship. [There were no innuendoes or

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introductory averments explaining the transaction to which the words related.]

Plea: not guilty.

Shee, Serjt., and *C. Russell* for the plaintiff.

Brett and *Aspinall* for the defendant.

In September, 1860, the plaintiff, as owner, insured the ship and cargo at Liverpool for 3,500*l.*, on a voyage to Madras, and the defendant was among the underwriters.

On the 8th of September she sailed, and on the 9th returned, making water. From that day till the 18th of September she was under repair, and then re-started on her voyage. In February she was at Rio, having put in there in distress, and the captain made a protest as to her condition, describing her as having made water the very day she set sail. The plaintiff then claimed to abandon her, as a total loss, on the ground that the cost of repairs would exceed her value. Correspondence ensued, in which the underwriters acknowledged a liability for a partial, but refused to recognize a total, loss, or to accept the proposed abandonment. Thereupon the plaintiff wrote to his agent at Liverpool the letter referred to by the defendant, in which, after stating that the cost of repair would be greater than the value of the vessel, he went on thus: "Therefore if the underwriters will not consent to the abandonment, they will ultimately be more out of pocket, because their risk does not cease until after the vessel reaches Madras, and in the meantime other disasters may occur. Please explain this to the underwriters, and let us know their reply and what they propose to do. In case they refuse, ask for funds to pay the expenses for repairs." This letter was shown to the underwriters, and, among others, to the defendant. They declined to accept the abandonment or pay for expenses, and a sum of 4,500*l.* was taken up on bottomry, out of which the ship having been repaired, in April, sailed for Madras. She was forced to put in at Port Louis,

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Mauritius, and, being surveyed, was found not worth repairing, and abandoned. The plaintiff then claiming as for a total loss, sent the papers to one Horton at Liverpool, in order to receive the money. The underwriters disputed the claim, and in June, 1861, Horton saw defendant about it. The defendant was disposed to pay seventy-five per cent., but denied a total loss. After this he spoke the words complained of in the first count, when speaking to Horton on the subject. The plaintiff then came to ask him for an explanation, and the defendant, no one else being present, said to him, "You refer to your letter to Munns. Well, you *did* write to that effect. I have seen the letter and I have a copy of it." When challenged to produce it he said he had mislaid it. This was the utterance charged in the second count.

It appeared that, since the speaking of the words, the underwriters had not settled the claim, requiring the plaintiff to give up all claim, whether as to ship or cargo, for seventy-five per cent., and to guarantee them against any claim of the bottomry bondholders; the ship having been saved.

Horton, being called for the plaintiff, and having stated that the defendant had desired to see all the documents relating to the ship,

Brett was cross-examining as to whether the defendant had not desired to see the plaintiff's letter to his agent (with a view to set up the point as to privileged communication); but

COCKBURN, C. J., said the defendant had no right to require that; it was not like a letter from the master to the owner; it was merely a letter from the owner to his home agent, and would be, moreover, in the possession of the *agent.* Moreover, the defendant professed to have not only seen it, but to have had *a copy of it.*

At the close of the case for the plaintiff,

COCKBURN, C. J., pointed out that there was no proof of

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the special damage. The settlement had stood still *after* the slander, but it was *post hoc, non propter hoc.*

Aspinall objected that, as the words were laid, there being no innuendoes nor inducement, it did not appear whether they were actionable, nor how they affected the character of the plaintiff as a merchant, and the special damage was negatived.

COCKBURN, C. J.—The want of innuendoes or inducement can be aided by amendment, as the evidence shows that the words were spoken under such circumstances as clearly to convey an imputation that the plaintiff meant, by dishonest means, to get a sum of money as for a total loss, to which he was not fairly entitled.

Brett submitted that there was no publication to support the *second* count, no one but the plaintiff having heard the words.

COCKBURN, C. J.—No doubt the substantial question is as to the first count, as to the words spoken to Horton.

Brett submitted that the words were privileged. Horton was acting as agent for the plaintiff; the defendant for himself and the other underwriters; and in the course of the discussion between them the defendant stated a supposed fact, detrimental to the plaintiff's claim, and which was strictly relevant, and so privileged.

COCKBURN, C. J.—There may, no doubt, be such a privilege, but when a man makes a pecuniary claim on another, the other has no right to traduce his character in order to get him to lower his demand. However, as the question of privilege will depend on the whole character of the case as it appears upon the *whole* evidence, I shall reserve my ruling upon it until the evidence is closed. Do you call witnesses?

Brett desired to have the ruling on the case as it stood; but

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COCKBURN, C. J., said that he was not bound to direct the jury until the case was closed. Thereupon

Brett called the defendant.

At the close of the case,

COCKBURN, C. J., told the jury the *occasion* was privileged. Were the words spoken reasonably *within* it?

Verdict for the plaintiff, damages 40*s*.

WELLS *v.* WEBBER.

Middlesex Sittings. Hilary Term.

One surgeon, having sent to another, at the same hotel, a book on a surgical subject unfit for the public eye, and the other having afterwards published a paper charging him with having indecently left it in a public place, and not being called to explain how it was that it came to be so exposed:—*Held*, that the jury might infer that he had himself put it there with a view of using it as a pretext for the charge.

After plaintiff's counsel has summed up, and defendant's counsel has proceeded some time with his address, too late to call the defendant.

LIBEL. The first count stated that the plaintiff was a surgeon, and had written a book for the information of the profession, and unfit to be read by the public, which he had sent to the defendant, also a surgeon, with directions to give it to him. It then charged that the defendant caused and procured to be composed and published a certain paper purporting to be a protest of certain visitors at an hotel, setting forth that the plaintiff had left the book there, with directions to be placed in some conspicuous place; and that they denounced this "a revolting violation of decency," "as a quackish and indelicate mode of advertisement," and as a demoralizing system of puffing, &c.

Second count, that the defendant caused to be published in the *Medical Circular* a letter to a similar effect, and embodying the protest before set forth.

Third count, on a letter to a similar effect.

Plea: not guilty.

Phinn and *Day* for the plaintiff.

Huddleston for the defendant.

The book in question related to disorders of females, and was illustrated with plates, which the plaintiff admitted were not fit for the public eye. For that reason, he said, he had only had a limited number struck off for circulation among members of the medical profession; and

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having been at an hotel, where he met the defendant, also a surgeon, he had sent him a copy by the "boots," telling him to take it up to the bed-room (where the defendant then was) and give it to him. The defendant and plaintiff were only known to each other, previously to their meeting at the hotel, as occasional writers on medical subjects; but in that way they appeared to have come a little into collision, and there was a coolness between them when they met, which, however, seemed to disappear, and in consequence, just before the plaintiff left the hotel, he sent the book as a gift to the defendant. The plaintiff heard nothing more about it until he found the "protest" published in the *Medical Circular*, and sent also to the College of Surgeons, of which he was a member. There was no evidence as to how this protest came to be drawn up, nor by whom; and though it purported to be signed by several persons (not including the defendant), none of them were called as witnesses. It was proved that after the publication the defendant had said at the hotel, "If he (the plaintiff) had written of me what I have written of him, I should think no one would speak to him again." The "boots" was not called.

Huddleston, for the defendant, having intimated that he should call no witnesses,

Phinn, for the plaintiff, summed up, and suggested that the defendant had drawn up the protest, or got it drawn up, and must himself have put the book in the coffee-room with a view of so doing.

Huddleston, in his address to the jury, was answering this suggestion, and endeavouring to account for his not calling either his client or the "boots," when

COCKBURN, C. J., observed, that it was most important to have called them, in order to show how the book came to be exposed to the general visitors at the hotel (*a*).

(*a*) The presumption is, that a clerk or other servant has delivered a message. *Middleton* v. *Barned*, 4 Ex. 241. On the same principle

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Huddleston thereupon offered to call the defendant; but COCKBURN, C. J., said it was now too late to do so.

At the close of the case,

COCKBURN, C. J., left it to the jury whether the defendant had found the book in the coffee-room (left there carelessly by the "boots"), and supposed it was left there by the plaintiff, or whether he himself had put it there, and used it to incite the visitors to the protest he had published.

Verdict for the plaintiff, 300*l.*

here it was to be presumed, that the servant delivered the book to the defendant, and if so, he alone could have shown how it came into the coffee-room. See *M'Ewen* v. *Cotching*, 27 L. J., Exch. 41, as to not calling a defendant.

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Middlesex Sittings. Michaelmas Term.

FERRIER *v.* PEACOCK.

The mere possession by a purchaser of the *means* of knowledge does not prevent the vendor's liability for a false representation; and the vendor having sold a lease as of a longer term, he knowing it to be of a *shorter*, he was held liable, although he had sent a draft conveyance reciting the lease, the recital not having been referred to by the purchaser.

DECLARATION, that the defendant, by falsely and fraudulently representing to the plaintiff that a lease of a certain house had then eleven years to run, induced the plaintiff to purchase the said house from the defendant for the sum of 300*l.* (which was then paid by the plaintiff to the defendant), whereas, in fact, the lease had not then eleven years to run, but was of much shorter duration, to wit, nine years, and consequently of much less value; all which premises the defendant at the time of the said representation and purchase well knew, but *the plaintiff did not know*, and then *purchased the lease upon the* faith of the said representation being true, and believing it to be so.

Plea: not guilty.

Hayes, Serjt., and *F. M. White*, for the plaintiff.

Shee, Serjt., and *Joyce*, for the defendant.

The defendant had been the legal owner of five houses, which, however, he had mortgaged, and in which he had

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only an equity of redemption. In the spring of the year 1861 he had issued an advertisement in these terms:—

"Lambeth. Eligible investment, consisting of five six-roomed houses, with garden front and back, let quarterly to highly respectable tenants; producing altogether 158*l.* per annum. Rent 46*l.*; taxes 24*l.*: 80*l.* per annum *net*. Lease, twelve years from Lady-day, 1860. Price 325*l.*"

In consequence of this advertisement the plaintiff came into communication with the defendant, and an agreement was entered into between them in writing in these terms:— "Dated the 29th April, 1861. Between J. Ferrier and R. Peacock, *estate* agent. That the former (the defendant) agrees to sell and the latter (*a*) (the plaintiff) to buy the lease, or under-lease, having *about* eleven years unexpired, of all those five messuages, &c. for the sum of 300*l.* The purchaser to pay the remainder on or before Monday, the 6th May next. The vendor to deliver no abstract of his title to the lease, or under-lease, and the purchaser hereby expressly agrees to *accept such title as the vendor has*, and to require no other title. The purchase deed to be prepared, at the purchaser's expense, by the *vendor's* solicitor."

The property had been mortgaged in 1856 to a land society, of which the defendant was the secretary, and his attorney in the transaction was the solicitor to the company, who held the mortgage. In accordance with the above agreement, this solicitor prepared the draft deed of conveyance, making it by some mistake a conveyance only of the equity of redemption. The draft was sent by him direct to the plaintiff, who observed the mortgage, and was told that it would be paid off out of the purchase-money before the conveyance was completed, and thereupon the mistake was corrected, and the amended draft taken by the *defendant himself* to the *plaintiff himself*. The draft assignment recited the leases on which the lands

(*a*) But evidently a clerical error.

were held, showing the dates of them, whereby, by means of computation, it could be ascertained how much of the respective terms would be then unexpired. It did not appear, however, that the plaintiff had made any such computation, nor that he had read the draft; and although his daughter, who was present on the occasion when the defendant brought it, asked some questions, it did not appear that her attention or her father's had been directed to this particular matter, or that either of them asked any question about it; nor did the defendant allude to it.

The *advertisement*, it will be observed, represented the lease as having twelve years to run from Lady-day, 1860; i. e. eleven years from Lady-day, 1861.

The *agreement* (which was for 25*l.* *less* than the sum asked by the advertisement) mentioned the lease as having *about* eleven years unexpired.

In *point of fact* the leases had then only about *nine* years to run.

The defendant having mortgaged the leases in 1856, had not seen the deed since then, i. e. for a period of about five years.

But, on the other hand, it appeared in the course of the case that he had on a former occasion put up the leases for sale by an advertisement, making the same misstatement as to the duration of the term, and had been *informed* of the mistake, but had (it will be seen) *again* put forward the same misrepresentation.

The purchase was completed and the full price paid.

In July, 1861, the plaintiff found out the true facts, and claimed compensation from the defendant, which was refused (on the ground that the leases had been disclosed on the draft deed), whereupon this action was brought.

It appeared that on the oral negotiations previous to the agreement, the defendant had said that the term to run was "about eleven years."

The plaintiff could not deny that he had read the draft

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deed, but *believed* he had not. And his evidence was, that on the completion of the purchase the deed was *not* read over.

The plaintiff had no other attorney in the matter than the company's solicitor, who prepared the deed; the evidence for the plaintiff being, that the defendant told them he would state all particulars to him, and that they, the defendant and his daughter, need not trouble themselves about the matter.

The party who had told the defendant the true duration of the term was called for the plaintiff and stated, that thereupon the defendant asked him to name a price, and he offered only 225*l.*, being 70*l.* less than the plaintiff had now paid. The defendant, however, *denied* that he had been told the term was less than eleven years, and swore he did not know it.

The attorney for the company was called on behalf *of* the defendant, and stated that his attention was never called to any complaint as to the duration of the term, and that he had sent the draft to the plaintiff, that he might consult an attorney. But it appeared that the attorney did not see the *agreement* until the assignment was executed.

Shee, Serjt., on behalf of the defendant urged, that there was no evidence that the plaintiff made the purchase on the *faith* of the representation, having an *opportunity* of ascertaining the truth.

Hayes, Serjt., for the plaintiff contended, that the only question was, whether the defendant made the representation, knowing it to be false; but

COCKBURN, C. J., left to the jury three questions:—

1. Was the misrepresentations made as alleged?

2. By means of it, was the plaintiff induced to give a greater sum of money?

3. Was it made by the defendant with a *knowledge* that it was false?

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HIS LORDSHIP, however, *reserved* the question, whether, upon the evidence, it could be said that the plaintiff made the purchase on the faith of the representation, he having the *means* of knowledge in his power (*a*).

Verdict for the plaintiff, damages 60*l.*

(*a*) Upon that point, *Shee*, Serjt., moved in Hilary Term, but took nothing, the Court (COCKBURN, C. J., CROMPTON, J. and BLACKBURN, J.) being of opinion, that there was ample evidence to sustain the verdict; and that the mere fact that the plaintiff had the *means* of finding out the truth, it not appearing that he *had known* it, did not militate against the action.

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Middlesex Sittings. Hilary Term.

PHAROAH *v.* LUSH.

When a written memorandum of the terms on which work is to be done does not show where it is to be done, nor by measurement or otherwise identify the work or define the *quantity* of work to which it applies, parol evidence is admissible to explain it in this respect, and show to what it refers.

THIS was an action to recover 83*l.* 17*s.* 4*d.*, for work and labour.

Plea: never indebted save as to 16*l.* 5*s.* paid into Court.

Joyce (with him *Hawkins*) for the plaintiff.

H. Mills and *Elliott* for the defendant.

The work was done by the plaintiff, in his business as a pavior and mason, in paving certain cellars of the defendant, a brewer. In the course of proving the case for the plaintiff,

Mills elicited that the plaintiff had signed a certain written memorandum, which was produced, and ran thus, without anything to show *where* the work was to be done:

"Paving with Portland stone, &c. (describing dimensions of the stones to be used, but not the measurement or quantity of the work) at such and such a rate per yard, half to be taken out in beer."

Joyce was then proceeding to elicit from the plaintiff that this memorandum only applied to one of the cellars, and not to the whole of the work.

Mills objected to this evidence, contending that the

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document must be taken to apply to *any* paving work done after the memorandum was made; but

COCKBURN, C. J., ruled that as the memorandum was wholly silent as to what work it referred to, that was a latent ambiguity which required to be explained by parol evidence.

Such evidence was accordingly given on both sides, and it appeared that the plaintiff, who could not read writing, did not understand that the memorandum applied to *both* the cellars, but that the defendant understood that it did; and both the cellars, which were contiguous, were paved in precisely the same way, at the same time, and so the same job.

Supposing the memorandum applied to the whole of the work, nothing would be due to the plaintiff *in money*, except the sum paid into Court to cover certain extras.

COCKBURN, C. J., left it to the jury, whether the memorandum applied to the *whole* of the work. They found a

Verdict for the plaintiff for 67*l.* 12*s.* 4*d.*

Coram Blackburn, J.

London Sittings. After Hilary Term.

BRIGHTLY *v.* NORTON (*a*).

An assignee under a bill of sale, with proviso that assignor should possess and use the goods until default in payment on a day to be appointed by *notice* in writing, there being nothing in the deed as to the *duration* of the notice:—*Held* liable in an action on the implied covenant, and also in trespass and in trover, for seizing the goods, after a notice in writing for payment on the same day, in a space of time so short as to make it impossible to get the money, it being left to the jury whether there was a *reasonable* notice. And plaintiff entitled to such damages as would place him in the same position as if he had received such notice.

THE first count was upon a deed, by which the plaintiff had assigned all his farming stock and effects to the defendant, with proviso for redemption on payment of 410*l.* on 5th March, 1870, "or at such *earlier* day or time as the *defendant* or his attorney or agent *should appoint* for payment thereof, by *notice in writing* sent by post or delivered to or left at the house or last place of abode

(*a*) *Vide Rogers* v. *Mutton*, in the Exch., *post*, a very similar case.

of the plaintiff;" but provided also, "that if default should be made in payment of the said sum or any part thereof, *contrary to the said proviso*, and the true intent and meaning of the deed, then, and *immediately* thereupon (*a*), it should be lawful for the defendant or his agents, *forthwith*, as, or at any time thereafter to enter, &c., and sell, &c., provided that *until default* should be made in payment it should be lawful for the plaintiff to hold and use the said goods, &c." (*b*).

Breach: that the defendant, without sending, &c. any [*sufficient* (*c*)] notice in writing of the appointment by the defendant of any *reasonable* earlier or other day for the payment of the said sum, and before any default had been made by the plaintiff in the payment thereof contrary to the said proviso and the true intent and meaning of the said deed, wrongfully, and contrary to his covenant (*d*) in that behalf, seized and took possession of the said stock, &c., and afterwards wrongfully *sold* and disposed thereof *as* under the provisions of the said deed (*e*), and received the proceeds of such sale to and for his own use and benefit. And by means of the premises, the plaintiff, before any default, was disturbed in the possession, use and enjoyment of the said goods, &c.

Second breach: for not rendering an *account* of the sale.

Third breach: that though there was a large surplus the defendant did not pay it over to the plaintiff.

Second count, that the defendant broke and entered the house, farm and premises of the plaintiff and continued

(*a*) See *Hyde* v. *Watts*, 12 M. & W. 254, as to these words in a deed.

(*b*) The word here omitted was inserted in the declaration in the similar action. *Rogers* v. *Mutton*, in the Exch., *post*.

(*c*) This amounted to an implied covenant by the defendant that until such default the plaintiff should so hold and possess.

(*d*) *Vide supra*.

(*e*) See *Ward* v. *Audland*, 16 M. & W. 4, as to the remedy by action on a covenant, where there has been a *conversion*, whether the goods are or are not the plaintiff's.

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therein, and made a disturbance and seized divers goods *of the plaintiff*, &c.

Third count, in trover.

Fourth count, for money had and received.

Pleas: 1. Not guilty.

2. To the first count: that the defendant before the seizing, &c. did, in pursuance of and under the provisions of the deed, duly give to the plaintiff, by delivering the same at his house, a notice in writing, appointing an earlier day, to wit, on the 30th April, 1860, for payment of the said sum, but that the plaintiff did not pay the said sum, &c., and then wholly made default.

3. To the second and third breaches: that the defendant did render an account, &c.

4. Leave and licence.

5. Never indebted.

Coleridge and *J. Martin* for the plaintiff.

Collier and *H. T. Cole* for the defendant.

On the 30th January, 1860, the plaintiff executed to the defendant a bill of sale of *all* his stock, &c., with the provisoes as set forth in the declaration; the property being worth 1,400*l.*, and the sum of 410*l.* for which it was given, including 43*l.* for interest, which was *at once* paid back. In the course of a few days the plaintiff obtained 110*l.* from one Peed, on the security of *another* bill of sale to him on the stock, &c., and paid it to the *defendant* in further liquidation of the debt.

On the 13th February, 1860, the plaintiff met the defendant with several men coming towards his house, and the defendant told him he was coming to seize his goods under the bill of sale, and then served him with a notice in writing, requiring payment within half an hour of the time when it was served. The plaintiff protested against the notice, and pressed for time until the next day, at least that he might get the money. But the defendant would

not wait, and seized all the stock and effects and sold them. The plaintiff's business was then stopped, and he had been obliged to assign his effects in trust for creditors. It did not appear whether, or how soon, the plaintiff could have got the money.

The defendant called no witnesses, but elicited the fact of the subsequent bill of sale to Peed (which, however, would not have been available until August), and also that the plaintiff was indebted to others.

BLACKBURN, J. (to the jury).—The defendant was bound to give *reasonable* notice, as none was expressed in the deed; whether, what would be reasonable notice is a question of *law* I will reserve for the Court. I should say, however, it is a question for you upon the facts, whether the notice given was reasonable.

If *not*, then the defendant is liable for such damages as will put him into the same position in which he would have been in if reasonable notice had been given (*a*).

Verdict for the plaintiff, damages 400*l*.

(*a*) This seems the general rule, even where vindictive damages are *not* admissible. Where, indeed, the defendant was *entitled* to seize, and it is a mere question of taking the wrong *goods*, as in the case of a distress on goods privileged, the damages may be merely nominal (*Harvey* v. *Pocock*, 11 M. & W. 740). But where the defendant had no right to take the goods at all, even although the plaintiff had already directed them to be sold, he may recover the full value, and not merely the sum they realized (*Lockley* v. *Pye*, 8 M. & W. 133). So where the goods might have been taken if *elsewhere*, as where they are taken out of the jurisdiction, the owner may recover the *full* value, and not merely the damage he has sustained by their being taken in a wrong place (*Sowell* v. *Champion*, 6 Ad. & E. 407). And a similar principle would seem to apply, where, as here, they were taken at the wrong *time*, for *non constat*, that if proper notice had been given, they would have been taken *at all*. And it is not for a mere wrongdoer to put the plaintiff to the proof that he could have got the money. (The case of a distress within the five days is exceptional, by reason of the statute.) If there were, moreover, circumstances of harshness in the case, the jury might give vindictive damages far *beyond* the full value (*Williams* v. *Currie*, 1 C. B.

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Rep. 841; *Thomas* v. *Harris*, 1 Post. & Fin. 67, confirmed in 27 L. J., Exch. 353). No doubt it has been held in a case at first sight very similar to the present (except that the notice was defined to mean twenty-four hours), that the assignor cannot (apart from *vindictive* damages) recover even the value of the goods, but only the measure of his limited interest therein (*Brierly* v. *Kendall*, 17 Q. B. Rep. 937). But there the notice had been given the *day before* the seizure, and so in *substance* the proviso had been observed. And the decision was only that the value was not *necessarily*, nor under these circumstances *reasonably*, the measure of damage.

Middlesex Sittings. Hilary Term.

Brokers employed to sell goods are bound to do so in the usual way, and if it is usual to send the seller an estimate of value, in order that he may be enabled to fix a reserved price, they ought to do so. And whether it is so or not, they are bound, for their own guidance, to make a careful estimate of the value; and if they sell, even by public auction, at a price much below the fair value, then not having made such an estimate will be evidence of negligence, and of a loss caused thereby, for which they will be liable.

SOLOMON *v.* BARKER.

ACTION against brokers for carelessly selling the plaintiff's goods under a proper price. The first count stated that the plaintiff employed the defendants as brokers for reward to *value and sell* certain feathers in the usual and customary manner.

Averment: that the defendants received the feathers to sell on these terms. Breach: that they did not value the same, nor sell them in the usual and customary manner, but sold them without valuing them, and not in the usual and customary way, but so negligently, that they were sold at a much less and lower price than they otherwise could and ought to have sold for.

Second count, that the plaintiff employed the defendants for reward to get certain feathers properly valued, and to submit the valuation to the plaintiff; and if the valuation were approved of, then to sell them at a price not less than that at which they were so valued. Breach: that the defendants sold them without a price being first put upon them, or approved of by the plaintiff, and so that they sold for a less price than they ought to have been sold for.

Third count, that the plaintiff employed the defendants for reward to value the feathers, and submit the valuation to him. Breach: that they did not value, &c.

Pleas: 1. Denying the employment on the terms mentioned in the different counts respectively.

2. Not guilty of the several breaches of duty laid in the different counts.

Huddleston, *Griffits* and *Cook Evans* for the plaintiff.

Shee, Serjt., and *Honyman* for the defendants.

On the 5th of August the plaintiff saw the defendants, colonial brokers, and engaged them to sell the feathers in question. [There was a contest of evidence as to what then took place, he stating that they were to make and submit to him a valuation or estimate of the price *before* selling, and *they* stating that he left them to do the best they could.] On the 12th of August he sent them the feathers, which were in two cases, fastened up. Next day the cases were opened in his presence, and the feathers were weighed. They were of various kinds, white, grey and black, of which the white were the most valuable. There were some of each colour in each case, and in different proportions. They were not weighed *separately* in his presence, but previously to the sale the quantity of each kind was weighed by the defendants' foreman, and a note of the weights made. The defendants had a sale on the 14th, and put the feathers in the catalogue for that sale, sending the plaintiff notice of the sale, which, however, he denied receiving. The sale was, as usual, by public auction, and the feathers were exposed for the inspection of the buyers on the morning of the sale, in the usual way. The defendants did not make any particular valuation of the feathers, though they stated that they formed a kind of notion in their own minds as to the probable selling value. They admitted that it was usual to make and send to the seller an estimate of the value in order to enable him to fix a reserved price, and he swore that they had promised in this case to do so. The feathers were sold in the usual way, not by weight, but in the

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bulk, the buyers looking at them as they lay exposed, each kind by itself, forming their own notion of the weight and value, and bidding for each lot of each different kind or colour at so much for the lot, taken in the lump.

The sale produced 121*l.*, and a sale note was sent to the plaintiff on the same day. He at once complained of the sale, and (as *he* swore) complained that an estimate of the value had not been sent to him. The defendants promised to try if they could get the feathers back from the buyer, if the plaintiff would pay what he wanted for his bargain. But the buyer, next day, resold to other persons for 200*l.*, and they wanted 20*l.* for their bargain. The feathers, therefore, could not be got back, and the defendants, on the 22nd of August, sent in their account of the sale to the plaintiff, charging 1*l.* 9*s.* for commission, and making the net produce 119*l.* On the 25th of August the plaintiff's attorney wrote to the defendants, declining to accept the sale, and demanding compensation, on the ground that they had sold much under the real value, and also without sending to him before the sale an estimate of the value, so as to enable him to fix a reserved price. [The buyer was now called for the defendants, and stated that he had estimated the value of the feathers at 170*l.* This, however, was his estimate not of a buying but of a *selling* price, and he said he should not have given so much. He admitted that he had got the feathers at a lower price than he had expected to have to give for them, and accounted for this by the fact that they had not been freed from the pepper which was always put in foreign feathers (to preserve them from vermin), and which was usually beaten out before they were sent to the brokers for sale. He accounted for having so soon resold the feathers at such a great advance of price by supposing that there was some sudden demand for them.] It was admitted on both sides that the price of feathers varied very frequently and very suddenly, in consequence of changes

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of fashion and other causes. The plaintiff's witnesses, however, valued the feathers at between 300*l.* and 400*l.*

The total weight of the feathers was about sixty-four pounds; and though there was some difference in the evidence as to the weights of each kind, there were between seven and eight pounds of *white*, the value of which appeared to be about 15*l.* per pound, which alone would come to 120*l.*, or about as much as the *whole* were sold for. [There was an error in the first advertisement, which stated the total weight to be sixty-four *ounces* instead of pounds.] The defendants had not endeavoured at all to estimate the value of each kind or colour of feathers, and their rough estimate of the value of the *whole* was 140*l.* When the plaintiff remonstrated with them for selling at so low a price, without sending him an estimate or catalogue, they said something about a "mistake," but it was not clear whether this referred to the omission to send the estimate or the catalogue, or the selling at such a price.

BLACKBURN, J. (to the jury).—Whether the defendants, as brokers, did their duty in the sale depends, in the first place, upon the terms on which they were employed to sell. If nothing was specially stipulated or directed, then it must be taken that they were employed to sell upon the ordinary terms. In that view, they were bound to employ due care and diligence, but would not be liable for mere *mistake* without negligence. They would not be liable, therefore, merely for a mistake in not understanding that they were to *send* the plaintiff an estimate. But if they were directed to fix a price, and *did not fix any*, then they would be liable. And so, if there was nothing *said* on the subject, but it is part of the ordinary duty of brokers to fix a price before a sale, as they did not do so, they would be liable. Of course, if the defendants were employed absolutely to sell at the next sale, there would be no obligation to send the plaintiff a catalogue or estimate.

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But even in that case the defendants would be bound, as brokers, to use ordinary care and diligence. And they would be liable if they sold the goods at a sacrifice, and threw them (so to speak) away. Hence they were bound to make some estimate of the price or value for their own guidance in the sale. And if they did not do so, and thus sold under the fair value, they are liable. The question is, whether they used due care and diligence when they sold the goods for the price they took. It is not a question *merely* of price or value, but whether they were guilty of *negligence* in not getting a better price, and in not using the ordinary care to do so. If you think they did not use due care and diligence, what damage has the plaintiff sustained?

The jury found a verdict for the plaintiff, damages 93*l.*

Court of Common Pleas, Guildhall, coram Erle, C. J.

FORD *v.* THE LONDON AND SOUTH WESTERN RAILWAY COMPANY (*a*).

London Sittings. Hilary Term.

In an action against a railway company for an injury alleged to have been caused by the negligence of their servants:—*Held*, that a railway company is bound to use the best precautions in *known practical* use to secure the safety of their passengers, but not every *possible* precaution which the highest scientific skill (according to speculative evidence) might have suggested. And if there are several grounds of negligence suggested, the jury must be satisfied that some one or other of them existed, and caused damage to the party injured, though they need not be able to ascribe the *whole* injury to *either*.

DECLARATION, that while the plaintiff was a passenger in one of the carriages of the company, they by their servants so negligently and carelessly managed the train and the engine, that the carriage was thrown off the line, and he was greatly injured.

Plea: not guilty.

Macaulay, *Manisty* and *Hindmarch* for the plaintiff.

(*a*) *Vide Stokes* v. *The Eastern Counties Railway Company*, *ante*, p. 691.

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Bovill, Hawkins and *Johnson* for the defendants.

The accident happened on the 28th of January, 1861. The train was an express train, which consisted of ten carriages and a break-van. The break-van, instead of being placed at the end of the line of carriages, was placed between the fourth and fifth. The train (which was going at the rate of thirty miles an hour) proceeded on its journey safely until it arrived at a part of the line between Wimbledon and Maldon, near the Epsom Junction, when one of the wheels of the tender got off the line, and upon going round a curve which is in the road at that spot three carriages flew off the line and fell down the embankment, and shortly afterwards two flew off in the opposite direction. In one of those carriages the plaintiff was sitting, and he was thrown about very violently. Two of his ribs were broken, his shoulder was put out, his bladebone had suffered a severe blow, and he was otherwise materially injured. The grounds of negligence of which the plaintiff complained were, first, that the tyre of the wheel which went off the line was in an improper state; secondly, that the train was going at too fast a rate; thirdly, that the gauge between the two lines of metals at the curve was in some places wider than at others; and, fourthly, that the break-van was in an improper place.

The defence was, that twelve minutes before the trains passed in safety the place where the accident occurred, and therefore that the line there could not have been in an unsafe state. That the accident was not occasioned by the wheel of the tender getting off the line, but by one of the carriages flying off. As to the second ground of complaint, the defendants contended that the train was an express train, and was not going at a greater speed than thirty miles per hour. As to the third, that the metals would always vary, and that on the best managed railways they would always be found to vary; and fourthly, that it was only a matter of opinion where the break-van should

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be placed, but on this occasion some of the carriages were to have been shunted, and therefore it could not have been put nearer to the end than it had been.

The evidence for the plaintiff was, for the most part, scientific and speculative; the object being to show that the accident arose from the shifting of the tyre (through its being loose and worn down), combined with the irregularity of the gauge, and the speed at which the train was going over it; neither ground being relied on by itself: but the case for the plaintiff being that there was negligence in each matter, and that all three combined to cause the accident, which was aggravated by the defect of break-power.

For the defendants it was proved that, as regarded the tyre, practical experience had proved that it need not be replaced until worn down below seven-eighths of an inch, and that it had not been worn below an *inch*. Every carriage, at the end of each journey, was examined and sounded. And the engineer who had charge of this engine was called, and proved that it had worked down to this journey in question without any indication of danger. As regarded the state of the line, evidence was given on the part of the company to show that they had every portion of it constantly inspected, to see that it was in good working order, and that this particular portion had been recently so inspected, a train having also passed in safety over it a few minutes before the one in question.

ERLE, C. J. (to the jury).—The action is grounded on negligence. Negligence is not to be *defined*, because it involves some inquiry as to the *degree* of care required, and that is the degree which the jury think is *reasonably* to be required from the parties, considering all the circumstances. The railway company is bound to take *reasonable* care; to use the *best precautions in known practical use*, for securing the safety and convenience of their passengers. If they have done so they have done their duty, and are not guilty

of negligence; if they have failed in their duty, and their negligence has caused the injury, then they are liable in the action. You are to consider what *is* reasonable care, and whether they have used the proper precautions. They are entrusted with most important interests, with human *lives*, and a jury may reasonably require an amount of care proportioned to those interests. At the same time a jury would not be entitled to expect the *utmost* care that could *possibly* be conceived, or the highest possible degree of skill. It is to be borne in mind that railways themselves are of recent introduction, and that their management is a matter of experience and of practical knowledge which increases day by day. It is not to be expected that the directors shall at once have in use every invention or discovery of science. It is sufficient if they use every precaution in *known practical use*, for the *safety* and *convenience* of the passengers. *Both* objects must be looked to. It is easy to conceive a precaution, for example, a slower rate of speed, which would add a very small degree of security, while it would entail a very great degree of inconvenience. And a company ought not to be found guilty merely because they possibly might have done something more for safety, at a far greater sacrifice of convenience.

It has been said that the mere fact of an accident is some evidence of negligence, until the company show that they have done all that was reasonably possible to do to avoid it (*a*). That question does not arise here, for there is express *evidence* of negligence, amply sufficient to call for an answer, and there has been a great deal of evidence in answer.

The case has been rested on *several* grounds of negligence, and if any one is sustained the plaintiff will be entitled to the verdict; but, on the other hand, as several

(*a*) *Vide Carpue* v. *The Brighton Railway Company*, 5 Q. B. Rep. 747. But it has since been held, that this depends on the *nature* of the accident.

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grounds, each insufficient, will not, put together, suffice, unless you find that one or other of them is sustained, you ought not to find for the plaintiff. First. Was there negligence in using the centre wheel, and if so, did that negligence cause the injury? Secondly. Was there negligence in the speed of the train over that part of the line where the accident occurred, and if so, did *that* negligence cause damage? (*a*) Thirdly. Was there negligence in respect of the break-power, either as being insufficient or badly placed, and if so, did that negligence cause damage? If you are satisfied on any one of these grounds of negligence, find for the plaintiff.

As regards the state of the lines, it seems to me that, as far as human precautions can go, the company have agents to act for them who would find out if the way was out of order. There seems to be *abundant* supervision.

As respects the alleged inequalities in the gauges, you must draw a distinction between mathematical accuracy and practical utility. It seems to stand to reason that a variation of half an inch, spread over 100 yards, beginning and ending in nothing, could hardly be perceptible in respect of the trains passing over the line. But these are matters for you to judge of.

If the line was in fair working order there was no negligence in allowing the trains to go over it. With regard to the break-power, weigh what is the known practical use with reference to safety and convenience.

The jury found that there was negligence in using the

(*a*) It is to be noted, that the Lord Chief Justice did not put it whether either species of negligence by itself and solely and entirely caused the accident, but whether each or either caused damage, i. e. *helped* to cause the accident. It might have been impossible to say which *most* caused it. There might be negligence as to *each* matter, and *neither* might have been the sole efficient cause of the accident; one might have been a direct and proximate cause, another a more remote or indirect one: one *causa causans*, another *sine quâ non*, &c.

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wheel of the tender, but that it did *not* cause damage; that there was negligence in respect of the speed of the train, and that it caused damage; that there was negligence in respect of the break-power, and that it had caused damage to the plaintiff.

Verdict for the plaintiff, damages 1,500*l.* (*a*).

(*a*) In Easter Term *Bovill* moved for a new trial, not on the ground of misdirection, but as against evidence. The Court, however, refused a rule.

XENOS *v.* WICKHAM.

London Sittings. Hilary Term.

A marine policy having been duly signed and sealed by directors of an insurance company, was handed by them to a clerk in their office to give to the broker when he applied for it, and with whom they had a running account for premiums, settled every month. He did not apply for it before the time for next settlement, when he disclaimed it as having been executed by an error, and the manager and he agreed that it should be cancelled, and the former indorsed the cancellation on the back of it, in accordance with his usual practice. The assured denied any authority to his broker to *cancel* the policy; but neither he nor his broker had applied for it before the news of the ship's loss arrived:—*Held*, that there was evidence in support of a plea of *cancellation* by consent of the plaintiff, and also evidence whence the Court could infer that the policy was never issued or entered into, never having been *accepted* by the broker.

THIS was an action on a policy of insurance for 1,000*l.*, on a ship valued at 13,000*l.*

Declaration, averring a total loss.

There was a count in trover for the conversion of the policy.

Pleas: 1. That the plaintiff did not insure as alleged.

4. That the defendant, at the request of the plaintiff, before the loss, *cancelled* the policy and returned the premium.

The defendant was sued as public officer of the Victoria Marine Insurance Company, on a policy alleged to have been duly issued by the company. The policy was in the usual form of the company's policies, and purported to have been signed, *sealed* [not "delivered"] by two directors and the secretary, in pursuance of the deed of settlement. At the head, and on the back, there were indorsed, "Premium, 105*l.*; duty, 2*l.*; sum assured, 1,000*l.*;" but the policy itself did not, in the body of it, in any other way mention the premium, except by confessing the payment

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of it in these words:—"The company confessing themselves paid the consideration due unto them for this assurance, from the assured, at and after the rate of ten guineas per cent." It was dated the 1st May, 1861, and was a time policy for twelve months, from 25th April, 1860, to 24th April, 1862. It was a policy "for 1,000*l.* on hull, stores, &c., valued at 13,000*l.*" There were no formal words of *delivery* on the policy, nor are such words usual in the execution of policies by the company.

On the 25th April, the plaintiff's broker effected policies on the ship for 5,000*l.*, which, however, were cancelled. He then, by the plaintiff's order, proposed, by his manager, one Fenn, to effect a policy for 2,000*l.*, at eight guineas per cent. Before the policy was made out, he, on the 30th April, applied to alter his proposal to 1,000*l.*, at ten guineas *per cent.* This was accepted, and a "slip" was accordingly handed in for the policy. This was the policy in question, which was made out and duly signed and sealed by the directors, and given out to a clerk in their office ready for delivery to the broker, who was, on the date of the policy, the 1st May, debited with the stamp and premium in his account with the company. No application was ever made by the broker or by the plaintiff for the policy until the day of the settlement of the monthly account, and it remained in the possession of the company. The company were used to make up their accounts with the broker every month, and the premiums were deemed due on the 8th of every month; and on the 8th June, the company, in due course of business, sent to the plaintiff's broker a *debit* note —"To premiums for May, 1861, 100*l*, less by 10 per cent. discount, 90*l.*; adding stamp, 2*l.*; 92*l.* due June 8th, 1861." To which was added, "The discount will be forfeited in default of prompt payment." The broker, however, disclaimed any knowledge of the policy, and it was accordingly sent to him by the company to inspect. His clerk still disclaimed it, and said it had not been intended that

the "slip" should be carried out, or the policy effected. The company's manager thereupon (on the 14th June) agreed to cancel the policy and return the premium; and it was arranged that the broker's clerk should have it for the purpose of getting a return of the spoiled stamp, previously to which the cancellation was to be indorsed on the back of the policy, in accordance with the usual practice of the company, in order to avoid an objection raised by the Stamp Office to erasure or defacing of the deed. Accordingly, the defendant's manager drew a cheque for 90*l.*, the amount of the *premium* (less discount), and passed it through the cash-book to the credit of the broker; and then indorsed a memorandum on the back of the policy in these terms:—"Settled; and a return of the whole of the premium on the within policy, and cancelled this insurance; no risk attaching thereto. 1,000*l.*; viz. 1,000*l.* at ten guineas per cent.; less discount, 90*l.*" This was signed by two directors in the usual way; and it appeared by the evidence for the defendants that this was the mode of cancelling the company's policies always adopted.

The broker's clerk had the policy given up to him to get the stamp allowed, as was alleged on behalf of the company; but he took no steps for that purpose, and retained the policy until the 2nd September, 1860, when the loss was known. On that day the broker applied at the office that the risk might be considered as "on;" the cancellation having (as he said) been owing to an error in confounding it with the prior policy for 2,000*l.* The secretary assented (as he said), provided the ship was safe, and the policy was left with him; but shortly afterwards, on the same day, the company received a slip from Lloyd's, stating that the ship was lost. The company then refused to give up the policy, alleging that it had never really been delivered or issued at all. The plaintiff, on applying for it, declared that his *broker* had been settled with for the premium.

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No premium had been paid to the company, nor settled for in accounts with the broker, otherwise than as before mentioned.

The case for the plaintiff was, that the policy had been duly *executed*, and that the cancellation was a mere error.

The case for the defendants was, that the policy had never been issued; or if it had, that it had been cancelled, and the alleged mistake never set up until after the assured knew of the loss.

The plaintiff's broker was called, and stated that the company's usage was to give the broker of the assured credit for the premiums. On the 1st May, the date of the policy, he received from the plaintiff an acceptance for premiums due on the insurances for 4,000*l.* effected on the ship (cancelled), and a small sum for *other* insurances (the latter not including the one in question); and it was suggested that this bill covered the amount due for the present insurance, and really amounted to payment by the plaintiff to *him*. He denied any authority to disclaim or cancel the policy now in question. He admitted that the premium was due on the 8th June, and did not say he had ever *settled* for it with the company.

It appeared that on the 2nd September a telegram was received at *Lloyd's* at 8·20 A.M., to the effect that the ship was lost.

The plaintiff admitted receiving a similar telegram on the *evening* of that day; but,

On the part of the plaintiff, it was insisted that the inference was, that he had received it at his office about the same time as Lloyd's.

On the *morning of* the same day, after the receipt of the telegram at Lloyd's, the plaintiff's broker called at the office of the defendants and desired to renew the policy, and was told that he could do so if the ship was safe; but time was taken to consider.

There was some contradiction in the evidence as to this

interview; but if the company agreed to renew the policy, there was to be a memorandum added to the memorandum of cancellation, "cancelled in error."

Before, however, anything was done to show that the policy was *renewed*, the defendants heard of the loss, and it never *was* renewed.

On the part of the defendants it was contended, that the policy never was entered into, because never accepted (*a*), and that it had also been duly cancelled.

It did not appear whether the clerk of the defendants, to whom the policy was originally handed out after being signed and sealed, was authorized to deliver it to the broker; but it appeared that the accountant who agreed to cancel had *not* such authority.

There was evidence on the part of the defendants that it frequently happened that policies were cancelled, and that they were always cancelled in this way; not by cancelling the slip, but the policy.

ERLE, C. J., proposed to leave to the jury whether they believed the evidence for the defendants; if so, there was sufficient evidence to support the plea of cancellation, and he should direct a verdict for the defendants, with leave to move; and liberty to the defendants to sustain the verdict on *either* ground.

(*a*) It was long ago held, that a deed of *grant* may be delivered to a party not the agent of the grantee, but that was on the principle that the authority to receive delivery might be presumed, being for the *benefit* of the grantee (*Doe* d. *Garnons* v. *Knight*, 5 B. & C. 471); upon which principle an *infant* may *take* under a grant, though he cannot *make* a grant, or bind himself by a contract. But the principle does not apply to a case of contract, in which there must be an assent on behalf of the other party, which cannot be but by an acceptance by some agent of his. And here the company's clerk could hardly be such agent, especially as the *broker* clearly *was* so. And even assuming the case to be one of grant, not contract (there being nothing stipulated to be done by the assured), still the delivery must be to some one authorized to deliver it over, and this was only to some broker *accepting* it for plaintiff.

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The jury were all of opinion in favor of the defendants; therefore,

Verdict for the defendants (*a*).

(*a*) Subject to leave to the *plaintiff* to move to enter it for him on the plea of cancellation; the defendant to be at liberty to sustain his verdict *either* on that plea, or on the plea denying that they ever became assurers, the Lord Chief Justice deeming that there was evidence whence the Court might infer that the policy never was issued; because never accepted by the broker, nor even delivered to any one with authority to deliver to him, *unless* he accepted, which it was admitted he had *not;* although it was alleged that his non-acceptance was in error and its cancellation unauthorized. Assuming that it *was* so, this would not affect the question of *delivery*, the clerk having no authority to deliver up the policy to a broker, who would not acknowledge or accept it, so that there was never a delivery to *any* one *receiving it on behalf of the plaintiff*.

CARALI *v.* XENOS.

London Sittings. Hilary Term.

A shipowner, being sued on a clause in a bill of lading, by which he was bound to forward the goods by steamer from London to a foreign port; the breach of duty being in not using due diligence to do so, whereby the season was lost:—*Held*, that it was not enough that he had let the discharge and sorting of the cargo take the usual course of business at the docks where the vessel discharged, if he neglected means which might well have been used to hasten the sorting and to procure vessels for the transhipment.

THIS was an action by merchant against shipowner upon bill of lading.

The declaration stated that one A. B. shipped on board the defendant's ship (bound for *London*) 117 "skeleton packages" of fruit from Smyrna, to be delivered at St. Petersburgh (freight at 7*l.* 10*s.* per ton, payable there, at the order of the defendant), *to be forwarded by steamer from London*, at shipowner's expense, and at shipper's risk, with a condition, that should it be known that the port is frozen, the shipowner to have the right of retaining the goods in London at the merchant's expense and risk, until such time as the port is free, when they shall be forwarded as per bill of lading, &c.

Averment: that the bill of lading was indorsed to the plaintiff; that the ship arrived in London on the 14th of October, 1860; and that during a reasonable and sufficient time, though the port of St. Petersburgh was not frozen.

Breach: that the defendant *did not, within a reasonable time, forward the goods*, but made default therein, and neglected so to do, by reason of which they did not arrive at St. Petersburgh, &c., and the plaintiff lost the benefit and profits thereof, &c.

Pleas: traversing the shipment on the terms alleged, and also the breach of duty.

3. That within a reasonable time there was no ship by which the goods could have been forwarded to St. Petersburgh according to the terms of the bill of lading, and that a reasonable time had not elapsed for forwarding the goods.

Lush and *Hannen* for the plaintiff.

Montague Smith and *Honyman* for the defendant.

On the 14th of October, 1860, the ship arrived at London, and on the 15th began to discharge. The defendant had given directions to discharge as soon as possible, being anxious to have the ship free. There were, however, no *particular* directions as to the plaintiff's packages, which being "skeleton" (i e. large crates, each containing a great many packages), were much larger than others.

There were in all about 80,000 packages in the ship, with about 400 different marks.

The plaintiff's packages were in the *lower* hold, scattered among those of all the other marks.

On the 18th of October there was a steamer to St. Petersburgh, *viâ* Hull.

On the 19th of October the *discharge* was completed.

The packages were then *sorted*, first in the alphabetical order of the initial letters of the marks, and then by being resorted according to the marks of the different merchants, according to the manifest and the entry.

Most of the goods were for *London*, and some of the merchants sent their lighters for such of their goods as were *not* to be transhipped for export, in order to receive

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them more quickly, it not being necessary in such cases to wait until the sorting was completed.

But no goods could be *transhipped* until the sorting was completed, because the merchant could not make his entries until he had from the dock company the total weights of his consignments.

On the 22nd of October, on the 27th of October, and on the 30th of October, there were steamers to Cronstadt, a port about eighteen miles from St. Petersburgh, and the usual port of discharge for large vessels bound to that city; but it appeared that in these vessels the "ice clause," as it was called, was required to be inserted in the bills of lading, a clause which ran thus: "That in the event of the navigation being impeded by ice, the goods may be landed at Revel, Riga, or any other port to which the vessel can get, and be forwarded by land at the shipper's expense and risk." And it was suggested, on the part of the defendant, that it was not for the interest of the merchant that the transhipment should be subject to this condition.

There were other steamers which called at Hull, and did not go direct to St. Petersburgh.

The sorting was not completed before the end of October, and before that time no goods were transhipped.

After that time there were no vessels to St. Petersburgh.

It would have been quite *practicable*, however, to have selected and put by the plaintiff's packages, as they were discharged, for the purpose of transhipment, though this would have impeded the discharge for some days, which it was the shipowner's interest to get over as quickly as possible. To the dock company it did not matter whether they put on more men to the work and got the sorting done by four men in two days, or eight men in one day. And they would have expedited the business if pressed to do so. But no particular directions were given by the defendant to select and put by the plaintiff's packages,

and the plaintiff swore (and this was not denied by the defendant) that on the 27th of October the plaintiff told him that his goods *had* been shipped on to St. Petersburgh.

There was evidence that between the 19th of October and the 30th of October the defendant *could* have sent on the plaintiff's goods by several ships, but that he objected to pay the freight demanded, viz. 40*s.* per ton.

The season had passed; hence the plaintiff's goods, which, being fruit, were of a perishable nature, did not get to St. Petersburgh, and were practically lost to him.

On the 6th of November, 1860, the present action was commenced.

M. Smith, for the defendant, contended that there was no negligence or default *before* that time; that the usual course of business had been followed by the dock company in discharging and sorting the cargo; that the shipowner was not bound to use extraordinary exertions, or take unusual measures; and that there were good reasons for not sending on the goods by the only steamers which could have been had before the action commenced.

For the plaintiff it was contended, that the defendant had hurried the *discharge* of the cargo to get his ship the sooner ready for another voyage; had taken no means to quicken the *sorting* of goods for transhipment; and that he had neglected to send on the goods merely to save something in the freight.

The plaintiff would have sent his own lighters for his goods had they been set aside for transhipment, as they might have been.

On the other hand, it was suggested, on the part of the defendant, that the sorting was partly delayed by the search for a missing package not sent.

There was no evidence of any other delay in the sorting beyond the *usual* time for discharging such a number of

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packages, and it appeared that the ordinary course of business had been pursued.

ERLE, C. J. (to the jury).—The action is on the clause in the bill of lading, "the goods to be forwarded by steamer direct from London (to St. Petersburgh) at the shipowner's expense." And the question turns on the plea, that the defendant used due care and diligence to forward the goods, according to the terms of the bill of lading. Did he do so? According to the plaintiff's evidence, he did *not* do so. If, for instance, he delayed the transhipment in order to save money he had to pay for freight, that would not be using due diligence, for he had no right to delay the goods for that reason. Again, the plaintiff might have even sent his lighters for the goods, had they been set aside, as they might have been, for transhipment. If, however, the delay was caused by the search for the missing package, and the defendant otherwise used due diligence, he would be entitled to the verdict. It is for you to say whether the defendant *did* use due diligence, seeing that he seems to have taken no steps to procure ships before the season closed, and gave no particular directions to the dock company to hasten the sorting of the plaintiff's goods.

Verdict for the plaintiff.

PENNELL AND OTHERS (Assignees of GREENWOOD) *v.* HEADING AND ANOTHER.

London Sittings. Hilary Term.

A trader having handed over wine warrants to the defendant, a creditor, on the occasion of a sudden stoppage of payment, caused by the unexpected withdrawal of assistance; the transfer being *pressed* for by the creditor in a hostile spirit, and concurrently with other steps taken for his own protection, and the trader assenting to it with reluctance and struggling against bankruptcy several weeks afterwards in the hope of surmounting his difficulties:—*Held*, that it was for the jury whether there was not a transfer of the *property* in the warrants for the benefit of the creditor, under pressure from him and against the *will* of the trader, and if so, the defendant was entitled to a verdict.

THIS was an action (of trover and for money had and received) by the assignees in bankruptcy of one Green-

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wood, to recover from the defendants, Heading and Bedell, the value or proceeds of certain wine, the warrants of which had been delivered by the bankrupt to the defendants, after stopping payment.

Lush, *Karslake* and *Honyman* for the plaintiffs.

M. Chambers and *Lloyd* for the defendants.

On the 9th of April, the bankrupt being indebted to Bedell and Heading, and also to one Lamb, had certain wine warrants deposited with the Bank of London as security for a loan account, on which he stood indebted to the amount of 1,350*l.*, and had a cash balance of about 500*l.*, against which he had drawn a cheque for 460*l.*; so that when the cheque was presented he would only have had a cash balance of about 40*l.* On that day, the 9th of April, he had tried to get Bedell and Lamb, who was an auditor of the bank, to induce the bank to assist him, by letting the wine warrants stand as a security for the loan account, and making some further advance. On the 10th the parties met at the bank (where one or more bills of the bankrupt's had been dishonoured the same morning), and in the interval it appeared that Bedell had acquired through Lamb some information as to the condition of the bankrupt's cash account, and had also discovered that the bankrupt had dealt with a certain bill with what Bedell deemed a breach of faith. Thereupon Bedell, having first seen the bank manager alone, they came out to him, and the manager told him he could do nothing for him, that he had, in fact, stopped payment, and that he must wind up. The bank had carried the cash balance of 500*l.* to the credit of the loan account, and so left the bankrupt without a farthing to meet the cheque or the bills which were thus dishonoured. The defendant Bedell then said to the bankrupt, "You had better give the wine warrants to me; they are as well in my hands as in any one else's;" and then brought pen and ink, and dictated to him an order, addressed to the

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bank, to this effect, "Deliver to bearer the wine warrants you hold, as payment of the debt for which you have a lien thereon." This the bankrupt wrote and signed, and the defendant Bedell paid the bank the 950*l.* remaining due to them, and received the wine warrants. He had afterwards sold the wine for about 1,600*l.*, from which deducting the 950*l.*, the sum he had paid the bank, there remained 695*l.*, the sum for which this action was brought, but which he claimed to retain for his own debt, far greater in amount. The defendants, just *after* the interview of the 10th, wrote to the bankrupt an angry letter, threatening that unless he gave security for the debt due from him, they should at once commence proceedings against him. On the 25th of May Greenwood filed his declaration of insolvency, and on the same day he was adjudicated a bankrupt.

The case for the plaintiffs was not that there had been a transfer of the wine warrants by way of fraudulent preference, but that there had been *no* transfer of them to the defendants, and only a *deposit* of them, not for the benefit of the defendants, but merely as a "pledge" (as the bankrupt phrased it) that he should wind up.

The case for the defendants was, that there *had* been a transfer of the wine warrants to them, and a transfer under pressure, so that, although voluntary, it was not a fraudulent preference (*a*).

(*a*) In order to render a preference on the eve of bankruptcy valid, it is not necessary that there should be a threat or pressure; with the immediate power of rendering it available, by taking legal steps to defeat the transfer, it must be shown to have been voluntary *and* in contemplation of bankruptcy, and if it is in consequence of pressure by the creditor, it is not *voluntary*. *Von Castell* v. *Booker*, 2 Exch. 691. In the present case, certainly the trader did not contemplate or *intend* bankruptcy; on the contrary, was indignant at the idea of it, and struggled against it, so that he did not succumb until six weeks afterwards, and the transfer was not voluntary, for he was most reluctant to submit to it.

According to the testimony of the bankrupt, who was called for the assignees, both he and the defendant Bedell were most excited and indignant at their interview of the 10th of April, the defendant being angry at what he deemed the bankrupt's breach of faith, the bankrupt at what he deemed the defendant's breach of promise; and although the defendant and bankrupt differed a little as to their accounts of what passed, it appeared that the bankrupt was most reluctant that the warrants should pass into the hands of the defendant, and that the attitude assumed by the defendant on that occasion was most adverse. This was further shown by the letter written just after, and also by the fact that, on the same day, the defendants placed an attachment on certain funds of the trader, who it was evident did not *intend* bankruptcy, and still struggled to the last against it, nor yielded to it until several weeks afterwards. And it was obvious, on the other hand, that Bedell, the defendant, was pursuing to the utmost his own interests, and *intended* to take a transfer for his own benefit.

In the course of proving the case for the defendants,

ERLE, C. J., pointed out that in urging the intention to take a benefit for themselves, they must take care not to fall into the mischief of a fraudulent preference.

Lloyd, in summing up for the defendants, urged that the transaction was obviously adverse and under pressure, and that the creditor, having better information than the others, had a right to use pressure to obtain a preference.

ERLE, C. J. (to the jury).—The question is, whether the defendants have proved to your satisfaction that the *property* in these warrants was transferred to them by the trader on the pressure referred to. The case for the plaintiffs is, that they were deposited with them merely to hold for the body of the creditors. The case for the defendants is, that they were transferred to them for their own benefit.

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It is clear they were pursuing their own interest, and desired to get the warrants for their own benefit. It is plain that Bedell complained bitterly of the trader for a supposed breach of faith, and was acting adversely; and it is for you to say whether, knowing what the defendants did of the circumstances of the trader, and that bankruptcy was impending, it would have been any object with them to hold these warrants for the general body of the creditors. Unless the transfer was for their own benefit, the question of fraudulent preference would not arise; and as the plaintiffs deny the *transfer*, they did not rely on that doctrine; but it is for the defendants to make out if there *was* a transfer for their benefit, that it was *not* fraudulent. If the warrants were obtained by the defendants by pressure, and the trader handed them over against his own will, to transfer the *property* to the defendants, find for *them*. If otherwise, find for the plaintiffs.

Verdict for the defendants.

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An agent employed to ship and insure goods having wilfully omitted to insure them is liable to the same extent as an underwriter would have been had he insured. The owner of the goods, having after a partial loss agreed with the agent to sell him the goods at a price less than the invoice price, stating (as was alleged) that they were worth the invoice price, and also asserting that the loss was *total*:—*Held*, that as these were matters rather of *opinion* than of *fact*, the statements would not, even if untrue, amount to *fraud*, which would avoid the agreement.

SMITH AND ANOTHER *v.* PRICE AND ANOTHER.

FIRST count: that the plaintiffs had retained the defendants as commission agents, for reward, to effect an insurance on certain wines of the plaintiffs, shipped from London to Demerara, on the terms that the defendants should use due and proper diligence to effect the same. Breach: that they carelessly omitted to effect the insurance, whereby the wines being afterwards greatly damaged the plaintiffs were unable to obtain an indemnity against such damage, &c.

Second count, that the defendants were liable to be sued by the plaintiffs for their negligence in non-insurance, as

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charged in the previous count; and thereupon it was agreed by and between the plaintiffs and defendants, that the plaintiffs should sell and the defendants should buy the said wines, and the plaintiffs give up their claim on account of such negligence, for the sum of 500*l.* Breach: nonpayment.

Pleas: 1. To the *first* count, payment into Court of 40*l.*

2 To the *second* count, a demand of the alleged agreement.

3. That the defendants were induced to make the contract by the fraud of the plaintiffs, and that, within a reasonable time after, the defendants had notice of such fraud, and before they had received any benefit under the contract, they repudiated and abandoned it, and gave notice to the plaintiffs that they did so.

Lush and *Honyman* for the plaintiffs.

Horace Lloyd for the defendants.

Before the transaction in question, the defendant Price had been concerned in shipping for the plaintiffs a quantity of wine, made up of various other wines, not including Madeira, but shipped by the plaintiffs to Demerara as Madeira wine.

On the 3rd January, 1860, the plaintiffs had desired that a similar consignment should be made up and shipped by the defendants, and the invoice, dated on that day, was headed as follows:—"Invoice of 14 pipes of Madeira, shipped *per Harbinger*, for Demerara, by Smith and Laxton of London, for their account and risk, to be sold if possible at Demerara, or to be reshipped in another vessel for Liverpool or Bristol, consigned by Price & Co. for account of Smith & Co." The total amount of the invoice price was 665*l.* The bills of lading were made out in the names of the defendants. The plaintiffs desired the defendants to effect an insurance on this shipment, and they professed

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to do so; and on the 8th January, debited the plaintiffs with the premium in their books. They made the shipment, however, without effecting any insurance, and the ship struck on a rock at Weymouth before the end of the month. On hearing of it, the plaintiff Smith saw the defendant Price, and asked if the consignment was insured; to which the defendant replied evasively, that he had a general insurance on the ship: in truth some brandies of the defendants and the wines of the plaintiffs were the only goods on board which were *not* insured.

The ship was got off with some amount of damage to the cargo, for which there was a general average.

On the 5th February the ship was brought round to the West India Docks, but most of the pipes of plaintiffs' wine were on shore at Weymouth.

On the 11th February, the plaintiff Smith, not having seen the wine, had an interview with the defendant Price, of which they gave rather different versions. The plaintiff's account was,—"He asked me what the wine cost, and what I would take. He offered 400*l.*; we at last agreed for 500*l.*; he gave me 200*l.*, and I gave a receipt, which ran thus:—'11th Feb., 1861. Received of Messrs. Price & Co. 500*l.* in full, for our claim on the loss of 14 pipes of Madeira *per* the Harbinger, as *per* invoice of the 3rd January, 1861.'" There was added this memorandum:—"Received 200*l.* to-day, 11th Feb., the balance to be paid on Saturday next." The version which the defendant Price gave was, that the plaintiff assured him that the wine was worth the invoice price, and that it was so damaged as that there was a total loss. The plaintiff denied this, though he admitted he stated his *belief* that the wine was damaged, and also that he should be a loser by the bargain, and that the wine cost him more than 460*l.* and would fetch more than he was to be paid.

At this time there were negotiations going on, unknown to the plaintiffs, between the defendant Price and the agent

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of Lloyd's, as regarded the value of the salvage, and the amount of general average was being estimated. The average statement was made up, on information furnished by the defendants (they appearing as owners on the bill of lading); the plaintiffs' wines were set down as worth only 650*l.*, and the defendants' brandies at only 2*s.* 6*d.* a gallon, so as to make a far higher average on the plaintiffs' wines than on the defendants' brandies. And about the same time the defendants agreed with Lloyd's agents to take the wines at 12*l.* a pipe, whereas their own estimate of their value was now 25*l.* per pipe, and the sum of 500*l.* which they had agreed to pay, was at the rate of 35*l.* per pipe. It appeared that, according to the usage of Lloyd's, the whole of such a consignment would be regarded as salvage, if, as was admitted to be the case, *one* pipe was utterly spoilt, and others partly damaged. At this time Lloyd's report had not been received, but it was suggested that the defendants being in communication with Lloyd's agent knew what it would be, and that, for the reasons they mentioned, they desired to be off their bargain with the plaintiffs, and to prevent the wines from being included in the sale of salvage.

On the 13th February, two days after their agreement, the defendants wrote to the plaintiffs this letter:—"We have received the report of Lloyd's surveyor, your wines are free from damage, and cannot therefore be included in the salvage sale of damaged goods; the portion of goods saved being returned to the owners, the underwriters paying all average. This will prevent an intended arrangement."

The report of Lloyd's surveyor was dated the 18th February (several days *after* the above letter), and it did *not describe* the wines as free from damage. On the contrary, it was admitted that one pipe was wholly spoilt and several others *partially* so, by reason of salt water; the evidence being contradictory as to the precise extent

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of the damage, and all the witnesses more or less differing as to the exact number of casks into which the salt water had so far entered as to spoil the wine, the matter being one of taste and opinion rather than of definite positive fact.

On the 18th February the defendants wrote, that the samples of the wines had been examined, that they were not of the invoiced value, and were not *Madeira* wines at all. The defendants refused all further payment except as to the one pipe totally spoilt, in respect of which they had paid into Court 40*l.*

The plaintiff Smith swore, and it was not denied, that the wines actually *cost* him 460*l.* and were *worth* to him at least 500*l.*

ERLE, C. J. (to the jury).—The question on which your verdict must turn is this, whether the bargain between the parties was obtained by the fraud of the plaintiffs? If *not*, then find your verdict for the plaintiffs for 300*l.* If it *was* obtained by their fraud, then, as the defendants not having obeyed their duty to effect an insurance, are liable to the same extent as underwriters would have been, find for the defendants, if you consider the sum of 40*l.* sufficient to satisfy the damage sustained by the goods: for the plaintiffs if you consider it is *not* sufficient. With regard to the question of fraud, if the plaintiff Smith asserted, *as of his own knowledge*, any matter of *fact* which has turned out to be false, and by *means* of such assertion obtained the contract, then that would be a fraud on his part, which would vitiate the contract. For if a man for his own object and his own benefit asserts a *fact* as known to himself to exist, which does *not* exist, he is guilty of fraud, whether or not he *knows* it does not exist, because he asserts it as of his own knowledge when he does not know whether it exists or not. This principle does not, it is obvious, apply to matters of mere *opinion*, but *only* to assertions of matters of *fact*, on which it may be supposed that the other party

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has *relied*. Now I cannot find that the plaintiff Smith made any statement of any definite matter of *fact* on which the defendant Price could reasonably be supposed to have relied. For instance, this could hardly be supposed of the plaintiff's mere assertion of his belief of the *value* of his wines. Nor of his alleged statement as to the extent of the damage; for he had not any better means of knowledge on that matter than the defendants, nor perhaps so good. He had not seen the wines, nor did he pretend to have done so. Had he indeed asserted that he *had* seen them, and that they were damaged to such an extent, it would have been otherwise. He might well have believed that the wines were worth what he was to get for them, or even the amount of the invoice price (supposing that he *said* so, which he denies), for it *might* be that they would have sold for that amount. As to the mixing of the wines the defendant knew all about it; was he really *deceived* by the plaintiff?

Verdict for the plaintiff.

KINNEAR AND OTHERS (Assignees of WALMISLEY and Another) *v.* JOHNSON.

London Sittings. Hilary Term.

TROVER by assignees in bankruptcy of two persons (Walmisley and Hammersley) to recover 487*l.*, the value of two parcels of goods, delivered by the bankrupts to the defendants before the bankruptcy.

There were two counts, the first laying the conversion *before*, the other *after* the bankruptcy.

Pleas: not guilty and not possessed.

Bovill and *Lloyd* for the plaintiffs.

Lush and *Quain* for the defendant.

The defendant professed to have received the goods in

In actions by assignees of a bankrupt to recover property on the ground of a fraudulent preference, no amount of embarrassment at the time of the transfer is enough to show that it was in contemplation of bankruptcy, if there were also a hope of assistance; but to show that the transfer is not voluntary, it must appear that there was such pressure as would be likely to cause the bankrupt to make the transfer.

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part satisfaction of an old debt for money advanced by them in 1857, and for which bills had been given by the bankrupts' firm in 1859.

In the private ledger of the firm there were entries as to this debt amounting to above 1,200*l.* In July, 1859, was the last entry in the stock-book.

In February, 1860, the firm had fallen into great difficulties, and their letters from that time up to the period when they stopped payment showed the greatest distress from want of money to meet their engagements.

On the 3rd of May, 1860, the firm had no funds to provide for payment of a demand of 50*l.*, and shortly afterwards they dishonoured a bill for 230*l.*

The 18th of May and the 2nd of June were the dates of the invoices of the two parcels of goods now in question, but there were suspicious circumstances as to the entries and the deliveries.

On the 18th of June the firm stopped payment, and on the 20th a proposal made at a meeting of creditors was rejected.

On the 4th of July they were adjudicated bankrupts, their debts being 17,000*l.* (of which 3,000*l.* were secured), and 7,000*l.* the amount of the assets.

An accountant, who had examined the bankrupts' books for the period since 1858, stated that their debts had exceeded the assets ever since July, 1859, the date of the last entry in their stock-book, and they were insolvent ever afterwards so far as he could judge.

Lush, for the defendant, submitted that there was no case, as there had been no demand on the part of the assignees before the defendant had disposed of the goods; *Stevenson* v. *Newnham* (*a*); and also that there was no evidence of a fraudulent preference; but

(*a*) 13 C. B. Rep. 285.

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ERLE, C. J., overruled both the objections, reserving the points.

Walmisley, one of the bankrupts, was called, and stated that they had no business transactions with the defendant, and therefore the transaction was entered in the *private* ledger of the firm, declaring that it only contained entries affecting the *firm*.

Hammersley, the other bankrupt, was also called, and stated that the defendant was to have the goods, and he had ordered some of them to be put up.

They stated that in May negotiations had been pending with one Edmondson to take him into the firm, with an accession of capital to the extent of 3,000*l*., and that these negotiations were not *broken off until the end of June*.

The defendant was called, and swore that he had lent the money on the terms that he should be at liberty to take it out in goods if he could not be paid in money, and that he had repeatedly pressed and applied for the payment as early as April, and was told the firm were short of money.

But there was no evidence of *pressure*, beyond mere application by the defendant.

ERLE, C. J. (to the jury).—To find for the plaintiffs, the assignees, you must be satisfied that the transfers of these goods were in contemplation of bankruptcy, *and* also by way of fraudulent preference.

There is hardly evidence that at the end of May, the time of these transfers, the firm contemplated bankruptcy.

There was, no doubt, at the end of May or the beginning of May, great embarrassment, but perhaps not contemplation of bankruptcy. The decision to stop payment takes some days to *grow up* in the mind of a trader, and ripen into a resolved *intention*.

On the 18th of June, beyond all doubt, the firm had bankruptcy in contemplation.

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It is for you to consider whether the goods were really delivered *before* that time or *after?* There is a great want of corroborative proof as to the dates of the deliveries.

With regard to the second point, the fraudulent preference, if the motive of the transfers of the goods was merely the desire on the part of the bankrupts to prefer the defendant, that would be fraudulent as regarded the rest of the creditors. You must be satisfied, in order to find for the plaintiffs on this point, that the transfers arose merely from a desire on the part of the debtors to favour and prefer the creditor, and not *by reason* of the demand, or the pressure, of the creditors.

Verdict for the plaintiffs (*a*).

(*a*) See the next case.

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In actions by assignees of bankrupts, to recover property from creditors, on the ground of a fraudulent preference, the conduct of the bankrupt in other transactions with other parties, at the same time, may be very material to show that he contemplated bankruptcy, and the mere fact of pressure on the part of the creditor is not enough to show that the transfer was not voluntary, unless it was really, also, by *reason* of such pressure, and not merely from a desire to favour and prefer the creditor.

KINNEAR AND OTHERS *v.* WALMISLEY.

THIS was an action by the same plaintiffs as in the last case, assignees in bankruptcy of Walmisley and Hammersley, against the *sister* of Walmisley, to recover two bills for 600*l.* and 400*l.*, transferred by the bankrupts to her before the bankruptcy.

Pleas: not guilty and not possessed.

Bovill and *Lloyd* for the plaintiffs.

Lush and *Quain* for the defendant.

The defendant had, in 1855, lent about 2,000*l.* to the firm, receiving a bill of sale, which in 1856 was given up. There were entries of the loan in the private ledger of the firm, with entries of payments of interest and cash down to the period of the bankruptcy.

In April and May, 1860 (as stated in the report of the last case), the firm were deeply embarrassed, and on the 5th of June the bill for 600*l.* on *Edmondson*, at six months,

was indorsed and transferred by the firm to the defendant, and on the 12th of June the bill for 400*l.* on Cuthbertson, also at six months, the one due on October 17th, the other on October 20th, 1860.

On the 18th of June the firm stopped payment.

On the 4th of July, they were adjudged bankrupts.

There had been no demand of the bills on the part of the assignees before October 20th, when the proceeds were received by the defendant.

And at the close of the case,

Lush, for the defendant, submitted that there was no case; first, because there was no evidence that the transfers were in contemplation of bankruptcy and by way of fraudulent preference; and secondly, because there had been no wrongful conversion.

ERLE, C. J., overruled, but reserved, both points.

The defendant was called and stated that in April, 1860, she had applied to her brother, the bankrupt, for payment, and he had referred her to the other bankrupt, to whom she said she had threatened that "if she were not paid she should take proceedings." (But there were no appearances of pressure beyond mere applications.)

She stated that her *brother* sent her the bills, for which she gave no receipt, and which were sent in an envelope without any written communication.

There were various suspicious circumstances about the entries as to the dates of deliveries of the bills.

After Edmondson's bill was delivered to her, her brother had told her that Edmondson would be prepared to pay her.

Edmondson was called to support her case, by showing that in May, and down to the end of June, he was negotiating for a share in the firm, to which he was to bring 3,000*l.*, of which this bill for 600*l.* was to be considered part; but, on cross-examination, it turned out that he was

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never in a position to bring capital into a concern; and that in May and June he had received from the firm goods to the amount of 1,400*l.* (to sell for them on commission), which they had just before purchased, and not paid for, and out of the proceeds of which the bill was paid.

Bovill, in reply, denounced the transactions with Edmondson as grossly fraudulent.

ERLE, C. J. (to the jury).—Were these bills transferred to the defendant in contemplation of bankruptcy, and out of a desire to favour and prefer her, and not by *reason* of any pressure on her part? The nature of the transactions of the firm just before that which is in question, must have a great bearing on both these questions. For if traders are not dealing in a fair mercantile way, they cannot have any honest hope of continuing to carry on business, and so may be taken to have contemplated bankruptcy. Then, as to whether the transfers were *voluntary?*

It is said there were applications which amounted to pressure. But it is not enough that there has been pressure. The very pressure may be pre-arranged. The question is, whether the transfers were really by *reason* of the pressure, or merely from a *desire* on the part of the trader to prefer the particular creditor?

Verdict for the plaintiffs.

CORNELIUS AND OTHERS *v.* HARRISON AND ANOTHER.

Hilary Term.

Where the managing clerk of attornies had, without their knowledge, received money for the purpose of investment: —*Held*, that the question was (in the absence of any *actual* authority) whether they had *held him out* as having authority so to receive it on their behalf.

ACTION for money had and received.

Plea: never indebted.

Huddleston for the plaintiffs.

Skee, Serjt., for the defendants.

The action was brought to recover from the defendants,

a firm of attornies, a sum of money paid by the plaintiffs to their managing clerk, one B., under the following circumstances:—

In 1855, one S. died intestate, leaving a widow and children, and administration was granted to the widow.

In 1857, C., the uncle of the children, instituted a suit, as next friend, on their behalf, to recover certain monies in which they were interested. In this suit the defendants were solicitors for the plaintiffs, and B., as their managing clerk, had the conduct of it. It appeared that he had his name on the door of a room at the defendants' offices, and was the only one of their clerks who had this privilege.

The suit was amicably ended by an agreement, under which a sum of money was paid to the plaintiffs, as trustees for the children.

B. then proposed to the plaintiffs to invest it on mortgage, and took them to see certain property, which he pretended was to be mortgaged to them. Ultimately the money was paid over to him by the plaintiffs, by their cheque, in *his* favour.

The plaintiffs did not, throughout the transaction, inquire for or appeal to the defendants, nor ask for the deeds; nor were any deeds executed. The transaction did not appear in the defendants' books at all. And B., though he had authority to receive money for them when paid by clients, for costs, in the ordinary way of business, had no authority to receive money by way of investment, nor did it appear that he had ever so received money in any instance before the present.

Shortly after he received the money he absconded; and the defendants were then, for the first time, applied to, and then became first aware of the transaction.

ERLE, C. J. (to the jury).—It requires a special authority, beyond that of a mere managing clerk, to entitle him to receive money, so as to bind his employers, for the purpose of investment. It does not appear here, that

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B. had any such authority. Did the defendants *hold him out* as having such authority? It does not matter that the plaintiffs *believed* he had such authority. The question is, did the defendants hold him out, or allow him to hold himself out, as having such authority?

Verdict for the defendants.

DIXON AND ANOTHER *v.* HERIOT AND OTHERS.

Hilary Term.

Although a clause, by way of condition or warranty, contained in a charter-party, cannot be got rid of by reason of its being part of a printed form, not adverted to expressly by the parties, and intended by one of them to be omitted; yet, if the other party was aware at the time that it could not be complied with, and after showing that it was broken, treated the charter as subsisting, it will afford him no defence to an action on the charter.

ACTION by shipowners against charterers, on a charter for a voyage from Cardiff to the Philippine Islands, or to Shanghai, as ordered. The ship, being at Fleetwood, was to proceed, with *all possible despatch*, thence to Cardiff to load [*not* saying tight, staunch and strong].

General averment, of all things necessary, &c. [The declaration making no mention of any clause of warranty that the ship was seaworthy.] Breach: not loading.

Second count, stating the charter to be for a voyage to Shanghai.

Pleas: 1. Denying the agreement as alleged.

2. That, before breach, the agreement was rescinded by the mutual consent of the parties.

3. That the ship did not proceed to Cardiff. [Issue and demurrer.]

4. That the charter ran thus:—That the ship, *being warranted now tight, staunch and strong*, and every way fitted and ready for the voyage, should, with all possible *despatch*, proceed to Cardiff to load, &c. Averment, that, at the time of the making of the charter, the ship was not, nor, at the time of setting sail and departing from Fleetwood, tight, staunch and strong, &c. [Issue and demurrer.]

5. Similar to the 4th, adding an averment, "that, by

reason of the non-compliance with the warranty, the ship was prevented from proceeding with all possible despatch direct to Cardiff, according to the charter, and was compelled to put back in the course of her voyage to Cardiff, i.e. to Liverpool, and there to be made 'tight and fit for the voyage,' and did not arrive at Cardiff until a long and unreasonable time after she ought, and could, and would have arrived there, had the warranty been complied with."

Lush and *Honyman* for the plaintiffs.

Bovill and *W. Williams* for the defendants.

On the 13th October, 1860, the charter was entered into containing the clause pleaded, "That the ship, *being warranted now tight, staunch and strong*," shall, with all possible despatch, proceed to Cardiff, and there load, &c.

It was admitted that, at the time of the charter, it was necessary, in order to fit the ship for the chartered voyage, to execute certain repairs, which were done with all possible despatch; that, for the purpose of such repairs, it was necessary that the ship should go into dry dock. On or about the 19th October, the ship was accordingly put into dry dock at Liverpool for these repairs.

On the 31st October a conversation took place between the plaintiff and one of the defendants, as to which they varied in their evidence; but of which the plaintiff's version was, that he mentioned that certain repairs were required, and that when they were completed accounts should be sent to the defendants (in order to inform the underwriters), and that the defendants assented to this course. And although the defendant gave a different version, it did not appear that it was at that time intimated that the defendants would refuse to load the vessel on the ground that the ship had not been able to sail direct to Cardiff.

On the 14th November the ship left the dry dock, but was twice forced to put back into the Mersey by stress of weather.

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On the 20th November it was known at Lloyd's that this was so.

On the 23rd November the ship reached Cardiff, and was ready to load a cargo.

On the same day the defendants wrote to the plaintiffs, that in consequence of the non-performance of the charter, to proceed direct to Cardiff, and the breach of the other conditions and warranties in the charter, they declined to load a cargo.

To this the plaintiffs replied, that "they had not delayed the repairs which they had stated were required, and that the delay was owing to the weather."

It was suggested, on the part of the plaintiffs, that the clause, "the vessel being tight," &c., was part of a printed form, to which attention had not been drawn, and which had been left in by mistake; but there was no proof that *both* the parties had mistaken or overlooked the clause (*a*); and the plaintiffs' main reliance was upon *waiver* by the defendants of the condition, which it was admitted had not been complied with. On the other hand, the defendants' breach of the contract was not denied.

ERLE, C. J. (to the jury).—As to the first point, it behoves you to be very cautious how you allow the words of a contract, which a party has signed, whether written or printed, to be got rid of by oral evidence, as to its not having been understood or adverted to at the time the contract was entered into. But the main point in the case is this—whether the defendants, knowing that the ship was not seaworthy at the time of the charter, nevertheless treated it as a valid contract? There is evidence for you that they *did* so treat it. There is the evidence of the plaintiffs, which shows that the defendants knew that the ship was to enter a dock and be repaired for the voyage, and that the warranty, literally, could not be complied

(*a*) Which would be necessary to raise even an *equity*.

with. Yet it does not appear that, when the parties met about the matter (whether or not the defendants *assented* to the repairs being done), the defendants declared that on account of the breach of the condition they did not intend to load the vessel. If you think that, after knowing the breach of the warranty, the defendants treated the charter as still subsisting, find for the plaintiffs.

Verdict for the plaintiffs.

Coram Byles, J.

LIDGETT AND ANOTHER *v.* PERRIN AND ANOTHER.

London Sittings. Hilary Term.

THE declaration (which commenced by stating plaint in the Sheriffs' Court, removed by *certiorari*) stated that, by agreement between the plaintiffs and *the defendants*, the *defendants* agreed to load on board a ship of the plaintiffs, about to sail on a voyage to Calcutta, certain boxes of soap, to be by the plaintiffs carried on board the said ship at a certain rate then agreed upon between the plaintiffs and the defendants, such payment to be made in London upon the loading of the said soap on board the said ship, and whether the ship should be lost or not lost.

Averment, that in pursuance of the agreement certain soap was loaded *by the defendants* on board the ship, and that the ship therewith set sail on the said voyage, and that *by reason of the premises* a certain sum became due and owing by the defendants to the plaintiffs.

General averment, of all things necessary to entitle the plaintiffs to be paid the said sum.

Breach: non-payment.

Second count, for freight and primage, and for money agreed to be paid by the defendants to the plaintiffs, *on putting goods of the defendants on board* a ship of the

Where goods of G. were shipped on board the plaintiffs' ship, on an agreement with the defendants, but the bills of lading were made out in the names of the *owners of the goods*, who were not known to the plaintiffs until *after* the goods were shipped, the freight being payable at the port of shipment:—*Held*, that it was for the jury whether there was not a contract by the *defendants* to pay the freight; whether or not the owners were not *also* liable.

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plaintiffs *to be* carried thereon on a voyage, and which goods *were* put on board accordingly.

Pleas: 1. Denying the agreement in the first count.

2. Never indebted as to the second count.

Karslake and *Murphy* for the plaintiffs.

Coleridge, Q. C., and *Pearce*, for the defendants.

In November, 1859, the plaintiffs, having in London chartered the ship referred to, put her up to load. On the 5th January, 1860, one of the defendants saw the plaintiffs, said he had some soap to ship for Calcutta, and asked the rate of freight. This was agreed upon, and the plaintiffs made the memorandum on the back of one of their cards.

"15 tons boxes soap, 39*s*. per ton of 40 feet, *payable here*.—J. L. & S."

The soap was accordingly shipped on board without any further communication between the plaintiffs and the defendants. It was in *fact* shipped by Gray & Co., but of this the plaintiffs had thereof no knowledge; the defendants not having said anything as to their being agents or acting for any one else. And though they were brokers, the plaintiffs did not know it at the time.

In the course of business bills of lading were sent to the offices of the *plaintiffs made out in the name of Gray & Co.*, stating, "freight to be paid *in London*, ship lost or not lost." These bills of lading got into the hands of Gray & Co., but not with the plaintiffs' knowledge.

The ship having sailed on the 10th January, the plaintiffs then sent to *the defendants* account of freight made out to *them*.

The ship was soon afterwards lost.

The plaintiffs applied first to the defendants for payment and then to Gray & Co., who referred them to the defendants, stating that they had paid the money to them. The plaintiffs then again applied to the defendants, who

did not pay, but according to the plaintiffs' evidence *promised* to do so, and the plaintiffs *then* (21st August, 1860) wrote to Gray & Co. in these terms:—"We have applied without effect to Perrin & Co., *your agents*, for your freight, and have now to give you notice, that unless it is paid we shall apply to the County Court for our remedy, we think *you should see we get our due*, &c." To this there was no answer. But in a day or two one of the defendants called and tendered the sum due for freight, disputing the primage. The tender was refused, and a plaint levied in the Sheriffs' Court against *the defendants*, on the trial of which *Gray* being called, stated, "He had not employed defendant as an agent. He called on me and said he heard I had some soap for Calcutta, and he could take it cheaper than I could do it elsewhere. I told him I *had* soap to ship. He told me the rate of freight by the ship in question. I agreed to ship the goods. *I saw the plaintiffs after the goods were on board*, and asked for *bills of lading in the name of Gray & Co.*: a day or two afterwards I *obtained them, made out in the name of Gray & Co.* I had paid the defendants money on a *general* account (having had many transactions with them) both prior to and after the 5th January. There is a balance now *due to them.* I never gave them special directions to appropriate any money in payment of this freight." [It appeared that Gray & Co. had since stopped payment, and hence it was important for the plaintiffs to fix the *defendants.*]

On this evidence, the Judge of the Sheriffs' Court directed a nonsuit, which the Court of Common Pleas in Michaelmas Term, 1861, set aside; being of opinion that there was evidence to go to a jury of a contract by the shippers, the defendants, to pay the freight. The cause was then removed by certiorari by an order of WILLES, J., and now came on for trial.

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BYLES, J., left the case to the jury on the evidence, in accordance with the ruling of the Court, and the jury found a

Verdict for the plaintiffs (*a*).

(*a*) See *Lindall* v. *Taylor*, 4 Exch. 219; 24 L. J., Q. B. 12; *Zwilchenbart* v. *Henderson*, 23 L. J., Exch. 234, as to rights or liabilities of *owners of goods* shipped. See also *Wagner* v. *Smith*, 24 L. J., C. P. 25; 15 C. B. 285, and *Smith* v. *Seiveking*, 4 E. & B. 945; 24 L. J., Q. B. 257, as to contracts created by bills of lading with *indorsees*; showing that the *whole* matter is for the *jury*.

Court of Exchequer, Guildhall, coram Martin, B.

GIBSON AND ANOTHER *v.* CRICK.

London Sittings. Hilary Term.

Where the plaintiff, a ship-broker, introduced the defendant, the shipowner, to a person who introduced another broker, and also a merchant, at whose suggestion, for his own interest, another merchant chartered the ship through the second broker: —*Held*, that the plaintiff, the *first* broker, was not entitled to commission, and that a witness could not be asked as to the effect of a supposed *custom* in such a case to pay the broker originally employed, the result being too remote, so that a custom would not be legal or reasonable.

ACTION by a ship-broker for commission on the charter of a ship, the *Indus*.

Plea: never indebted.

Kenealey for the plaintiffs.

Bovill for the defendant.

The plaintiffs, ship-brokers, were called, and stated, that they had told the defendant they had orders to charter some ships, and proposed to charter one of his ships, the *Indus*. He had *five* ships, and proposed that they should charter all of them. One of the plaintiffs then (on the 12th October) went to Spicer to see if this could be arranged. There, one Bolton, the broker of one Lee, was introduced to the defendant by Spicer, and Lee also was present, and arranged to charter three of the other ships. As Lee's partner, however, would not accept, these charters were not carried out. The defendant, on the day when they were entered into, asked what was to be done as to the *Indus* (the ship in question) as he intended to charter it? The plaintiff said, that whatever was done in respect of the *Indus* he should expect his commission. The defendant replied, that he did not recognize him in the transaction.

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The plaintiff heard nothing more of the transaction until a few days after, when he heard that the *Indus* had been chartered to one De Mattos, and that Spicer and Bolton were to share the commission. The charter was from Newport to Bordeaux. Bolton was called, and it appeared that it was Lee who had mentioned the ships to De Mattos, and thus led him to determine to charter the *Indus*. Lee had an interest in promoting the trade in coal from Newport, and agreed to advance money on the adventure. Having got De Mattos to agree to it, Lee went to Bolton and told him, if he could get the defendant to agree to the charter, he should be paid his commission; and then, in the usual way, Bolton and Spicer, as agent of the defendant, the shipowner, agreed to divide the commission. The plaintiff and De Mattos were never in communication, nor did the plaintiff ever meet or know Bolton as the agent or broker of the charterer, De Mattos, nor was the plaintiff at all aware of what was going on, nor had he any knowledge of the negotiation for the charter between Bolton on behalf of De Mattos, and Spicer on behalf of the shipowner, the defendant.

No custom or usage was proved or proffered in evidence as to a right to commission under such circumstances; but,

Kenealey, for the plaintiff, proposed to ask a witness this question,—"What is the custom with regard to payment of brokers' commission, when the broker introduces another broker to the shipowner, and the shipowner subsequently negotiates with one of the brokers introduced?" (*a*)

MARTIN, B., refused to allow the question to be asked,

(*a*) This question did not state the case correctly, for here, the broker (the plaintiff) did not "introduce another broker," who afterwards negotiated, but the party the plaintiff introduced (Spicer) introduced Bolton, who saw Lee and negotiated.

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and there being no further evidence, said he was prepared to direct a verdict for the defendant.

Kenealey declined to yield to a nonsuit, whereupon MARTIN, B., directed a verdict for the defendant (*a*).

(*a*) *Kenealey*, in Easter Term, moved the Court, citing *Cunard* v. *Van Oppen*, 1 Fost. & F. 716. But the Court (POLLOCK, C. B., MARTIN, B., BRAMWELL, B. and WILDE, B.) distinguished that case, as the particular question here proposed to be asked was clearly inadmissible (because it went to the effect of a supposed custom not properly proved); and further, as the custom, even if proved, would not have been legal or reasonable, because it would give a claim to commission on account of a result far too remote from the agency of the plaintiff, who had not introduced the parties together at all, but had only been the indirect means of their becoming acquainted.

ROGERS *v.* MUTTON (*a*).

London Sittings. Hilary Term.

The assignee under a bill of sale, with proviso for possession by assignor until default in payment on a distant day, or until some earlier day appointed by assignee by notice in writing, *nothing* being stated in the deed as to the *duration* of the notice: *Held*, liable in an action on the covenant, and in trespass, for seizing the goods on an earlier day, after a written notice to pay in so short a time, on the *same day*, as to allow of no time for getting the money, it being left to the jury whether such notice was *reasonable*.

THE first count stated that the plaintiff had by deed assigned his farming stock and effects to the defendant, with proviso for redemption on payment of 55*l.* on 5th March, 1870, "or at *such earlier day or time as the defendant* or his attorney or agent should appoint for payment thereof, by notice in writing sent or delivered to or left at the house of the plaintiff, provided that, if default should be made in payment of the said sum or any part thereof, contrary to the said proviso and true intent and meaning of the deed, then, and *immediately* thereupon (*b*), it should be lawful for the defendant or his agents, forthwith (*c*), or at any time thereafter, to enter, &c., and seize, &c., and sell, &c., provided that *until* default should be made in payment, it should be lawful for the plaintiff to hold, possess and use the said stock without let or disturbance by the defendant" (*d*).

(*a*) *Vide Brightly* v. *Norton*, *ante*, p. 722.

(*b*) *Vide Hyde* v. *Watts*, 12 M. & W. 254.

(*c*) *Vide supra* (*a*).

(*d*) An implied covenant by the defendant that the plaintiff should so enjoy.

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Breach, that the defendant afterwards, without sending or delivering to the plaintiff *any* (*a*) notice in writing of the appointment by the defendant of any *reasonable* earlier day or time in that behalf for the payment of the said money and before any default had been made by the plaintiffs in the payment of the said sum contrary to the said proviso and the true intent and meaning of the said deed, wrongfully, and *contrary to his covenant* in that behalf (*b*), seized and took possession of the said stock, &c. and afterwards wrongfully sold and disposed thereof *as under* the provisions of the said deed, and received the proceeds of such sale to his the defendant's own use (*c*). And by means of the premises, &c.

Second breach, for not accounting, &c.

Third breach, for not paying over the proceeds.

Second count, in trespass.

Third count, in trover (*d*).

Pleas: 1. Not guilty.

2. That due notice was given.

3. Leave and licence.

O'Malley and *J. Martin* for the plaintiff.

Collier and *H. T. Cole* for the defendant.

On the 5th of March, 1860, the plaintiff executed a bill of sale to the defendant, with the provisoes stated in the declaration, and as security for the sum of 55*l.* There was a *verbal* agreement between them, that the plaintiff should have the money *for two months certain*, on paying 3*l.* interest in advance, and so on from two months to two

(*a*) The word *sufficient* was here omitted, which was inserted in the similar action. *Brightly* v. *Norton*, *ante*, p. 722.

(*b*) *Vide supra* note (*d*), p. 768.

(*c*) *Vide Ward* v. *Audland*, 16 M. & W. 862.

(*d*) See *Ward* v. *Audland*, 16 M. & W. 862, as to an action of *covenant*, in such cases, where there has been a *conversion*—whether or not there is property in the plaintiff to maintain trover. As to which, *vide Brierley* v. *Kendall*, 17 Q. B. Rep. 437; 21 L. J., Q. B. 161; *Fenn* v. *Bittleston*, Ibid. Exch. 41.

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months, and a receipt for 3*l.* for interest from 19th March to 19th May, 1861, was produced.

On the 30th April, 1861, the defendant, with several other persons, went to the plaintiff's house, and shortly before two o'clock served him with a written notice to pay the money by two o'clock on that day. The plaintiff remonstrated, and pressed for at least an hour or two to go and get the money, to which the defendant appeared to assent, and the plaintiff went away for the purpose, but in his absence the defendant seized his stock, &c. on the premises and removed it.

There was some attempt to prove an implied assent to this course in the event of the plaintiff not being able to get the money, and it appeared that he had *not* got it by the time the removal was completed, just as he *returned*.

The goods were afterwards sold, and 2*l.* 2*s.* paid to the plaintiff as the balance.

The value of the goods was shown to be 200*l.*, and there was evidence that they were sold carelessly and under the proper value.

There was evidence also that the defendant's men behaved with violence and rudeness in the plaintiff's dwelling-house and premises, and towards his wife and the other inmates (*a*).

It appeared, also, that the removal of the stock, &c. put an end to the plaintiff's business as a farmer, and that the taking away his furniture deprived him of his dwelling (*b*).

(*a*) Which would justify *vindictive* damage, i. e. even beyond the full value of the goods: *Williams* v. *Currie*, 1 C. B. 841, a very similar case, where, as here, the defendant had entered without notice, and the value of the goods was only 200*l.*, but the damages 300*l.*, a verdict which was upheld by the Court as not excessive.

(*b*) *Collier* got a rule for a new trial, which was argued in Easter Term, and both as to the main point, whether the deed imported or admitted evidence of a *reasonable* notice, and also as to the *damages*. On the first point, that the deed might *imply* a reasonable time, see *Hyde* v. *Watts*, 12 M. & W. 254. And that, even if it did not, yet as it was *silent* on the point, parol evidence would be admissible to

MARTIN, B. (to the jury).—Was the notice reasonable? That is a question for you (*a*). If it was *not* reasonable find for the plaintiff, unless you believe he *assented* to the defendant taking the course he did, which is very *unlikely* (*b*); and if you think there was no assent, and

explain the ambiguity as to the word "notice," or to *add* a term not contradicting or altering *anything in the deed*, *vide Carpenter* v. *Buller*, 8 M. & W. 214; *Humphrey* v. *Dale*, 26 L. J., Q. B. 137; *Smith* v. *Buttams*, Ibid. Exch. 232. That the question of reasonable notice is for the jury, whether it means a reasonable time to do the particular act, or what is reasonable under *all* the circumstances, *vide Goodwyn* v. *Cheveley*, 28 L. J., Exch. 298. The Court appeared to be strongly of opinion that some reasonable notice was required, and that the rule to be laid down as to what was reasonable would probably be, the time necessary to enable the plaintiff to get the money; and supposing him to be able to do so, either by recourse to his bankers, or by borrowing it from a neighbour, it not being reasonable to expect that he would keep the money about his person, or even locked up in his house; and the natural meaning of the word "notice," especially coupled with the words "*left* at the place of abode," &c., was, that was to be something beyond a mere *demand*, and to *precede*, by some reasonable time, the actual seizure of the goods, and what would be reasonable was for the jury. But as they thought that the debt should be deducted from the damages, they suggested that the defendant should be content with a reduction of the damages to that amount, to which both parties acceded. This point, however, was not argued; and though in *Gillard* v. *Bates*, 8 M. & W. 575, it was held, that in an action for a debt for goods sold, the defendant could not plead a re-taking of the goods by the plaintiff, that was a mere plea of the *tort*; and in *Jones* v. *Sawkins*, 5 C. B. 142, it was held, that it was a good answer in debt, that the plaintiff had taken goods wrongfully, *and retained them in satisfaction*. It should seem, therefore, that in this case the plaintiff was entitled to retain the full damages, the defendant being a wrongdoer (*vide Keen* v. *Priest*, 28 L. J., Exch. 157; *sed vide Chunery* v. *Viall*, 29 L. J., Exch. 180, which, however, was only trover, and the price was due), even apart from the question as to *vindictive* damages, as to which, *vide* Vol. I., p. 68, and 27 L. J., Exch. 353.

(*a*) *Vide ante*, p 722.

(*b*) Still it would be for the jury, because the circumstances of violence, &c. not amounting to any *substantive* trespass (such as the breaking of outer doors, &c.), would be mere matter of aggravation, assuming any right to enter and seize, although it is otherwise of a personal assault, which *ex vi termini*, and as a matter of *law*, excludes licence or assent. *Christopherson* v. *Bare*, 11 Q. B. 473.

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that there was *not* a reasonable notice, find for the plaintiff, with such damages as you think reasonable under all the circumstances.

Verdict for the plaintiff, damages 300*l.* (*a*).

(*a*) The learned Baron refused to stay execution, thereby showing that he did not deem the damages excessive; and *vide* similar case and similar verdict, coram BRAMWELL, B., *Thomas* v. *Harris*, *ante*, Vol. I., pp. 68, 69, *et vide ante*, p. 722.

Middlesex Sittings. Hilary Term.

Where a newspaper proprietor carried on business under the control of inspectors, who were empowered by the deed to pay costs, &c., and reimburse themselves out of monies they might receive, there being nothing in the deed to import personal liability:—*Held*, that they were not personally liable to an attorney who had defended a suit relating to the business at the order of the trader, without any direction from them, unless there was anything in their previous communications with him to lead him to suppose they meant to make themselves personally liable for such claims.

STEELE *v.* LOW AND ANOTHER.

ACTION for work and labour as an attorney.

Plea: never indebted.

Manisty and *Prentice* for the plaintiff.

Lush, *Keane* and *Wills* for the defendants.

The claim was chiefly for the costs of defending an action for libel—*Jones* v. *Young*—brought against one Young, the printer, publisher and editor of the *Sun* newspaper. And the action was against two persons, Low and Clayton, inspectors under a deed entered into between Young and his creditors.

In 1848, one Harmer being then mortgagee in possession, the deed in question was entered into between one E., a prior mortgagee, Harmer, Young, and Low and Clayton (the defendants), with the rest of his creditors. By this deed the defendants were appointed inspectors, and Young was to continue to act (as he had been acting) as printer, publisher and editor for Harmer, until his debt was paid, at a salary to be paid to him (he, however, not to be liable to dismissal), and he was to carry on and conduct the newspaper under Low and Clayton's inspection. The funds were to be applied, in the first instance, to "the payment of expenses of and incident to the management, and incident to any actions and suits, in any way relating

to the premises, by the inspectors, when the same shall be by them judged advisable." Covenant by the creditors that "the defendants should be indemnified out of the estate, or by the creditors, in respect of all matters and things which they should lawfully and rightfully do, or cause to be done, or direct or order to be done, in or concerning the estate and effects of the trader, by virtue of and in pursuance of these presents." Power to the inspectors, out of monies which should come to their hands, "to retain and reimburse themselves all charges, costs and expenses which they might be put to, in or about the execution of the trusts, or otherwise by virtue of these presents." Harmer to have power to permit them to carry on the business, &c. Weekly accounts to be sent to him.

[There was no provision in the deed expressing or implying (otherwise than as above mentioned) any personal liability in the defendants (*a*), or any liability on them to pay, except out of the assets or estate.]

In 1848, Harmer was registered proprietor, but after the above deed was executed he took no part in the management, which was left in the hands of Young, under the control of the defendants.

The plaintiff was Harmer's attorney, and, as such, received a weekly statement of accounts.

In 1853, Harmer died, and the plaintiff acted as solicitor to the executors.

Previous to Harmer's death, there was an account in plaintiff's book, in which he debited Harmer with costs relative to the *Sun;* and after Harmer's death the account was continued in the book, including all costs relating to the *Sun*, and, *inter alia*, the costs claimed in this action. [But this account, the plaintiff said, had not been sent in to the executors, nor was it headed or entered to the estate of Harmer; but was headed, "*Sun* Account, *In re* Young," and indorsed "*Sun.*"]

(*a*) *Vide Wardell* v. *Jackson*, Vol. I., p. 452.

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The plaintiff stated that from 1848 to 1856 several actions had been defended by him on the orders of Young, and several bills of costs sent in and paid by cheques *signed* by the defendants; but it was admitted that they had been signed *in blank*, and filled up and delivered by *Young*. Nor did the plaintiff say that he had received orders or directions from the *defendants* as to these costs or suits.

The bill of costs now claimed commenced in 1856 and closed in 1857. It was then sent in [*not headed to any one*] to the defendants. During the course of the suit the plaintiff received no order or direction about it from the defendants, nor were they, in fact, aware of it until the trial. After the bill was sent in, the plaintiff received from Young a cheque for 100*l.*, signed by the defendants in blank, and filled up by Young; and subsequently he received 350*l.* from them *out of the assets of the estate.* At a meeting on the subject, in which they agreed that he should have this sum *out of the estate*, they protested against any personal liability, i. e. against any liability except out of the funds of the estate in their hands. And it was not opened for the plaintiff that they had any funds in their hands out of the estate; and it was stated on their part, and not denied, that they had, in fact, none; the paper barely paying its expenses. Several letters were put in, in which the defendants spoke of costs as to come out of the *estate.*

On this evidence, which formed the whole case for the plaintiff,

MARTIN, B., expressed his doubt if there was any case for the jury, but was strongly of opinion that there was no personal liability in the defendants. The deed certainly did not contain anything which imported a personal liability, though he could not say that there was not *any* evidence for the jury; in the rest of the evidence, it did not, in his view, carry the case any further. The deed merely

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empowered the defendants to pay out of the funds derived from the estate, and there was nothing in any letter or other communication of theirs to the plaintiff which implied any contract for a *personal* liability; i. e. a liability at all events, and out of their own pockets. He, however, left the whole case to the jury, asking them whether they thought there was any such understanding between the parties?

The jury at once declared that, in their opinion, there was *not*, and were about to find a verdict for the defendants; when

Manisty elected a

Nonsuit (*a*).

(*a*) Upheld by the Court, E. T.; *vide Wardell* v. *Jackson*, 1 Foet. & Fin. 452, a similar ruling of ERLE, C. J.

RAYNOR *v.* CHILDS AND ANOTHER.

Middlesex Sittings. Hilary Term.

An action maintained by a person who had hired a railway truck to carry his cattle, against a third person for wrongfully putting *his* cattle in, and so crowding and crushing the plaintiff's cattle.

Leave refused at the trial to add a plea of an arbitration and award upon the cause of action, although such defence had been pleaded by a co-defendant.

THE declaration (dated 1st December, 1861) stated that the plaintiff, being possessed of certain cattle, had hired of a railway company the use of a cattle truck, and the right to have cattle conveyed therein by the company from A., a certain station, to B., another station; and that the plaintiff had entrusted the cattle to a drover, to drive them to A. and put them in the truck, and deliver them up to the railway company; but that the defendants, *by falsely and fraudulently representing* to the company and to the drover that they, the defendants, had been ordered by and had the authority of the plaintiff to take charge of the cattle, and that two oxen of the defendants were the plaintiff's beasts, *caused* and procured the drover and the said company respectively to allow the defendants to have, and they thereby obtained, possession of the plaintiff's cattle and the said truck, and then *wrongfully* and without his leave and against the will of the *plaintiff* placed their said

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oxen in the truck with the plaintiff's cattle, and caused them to be carried by the company in the truck, as and with the cattle of the plaintiff, whereas, as the defendants well knew, they had not been authorized so to do, whereby the plaintiff's cattle were crowded and jammed together in the truck, and were greatly injured, &c.

Second count, that the plaintiff was *possessed* of a cattle truck, crowded with cattle, and that the defendants wrongfully seized and took possession of it, and placed other cattle therein, whereby, &c.

Third count, upon a reference of matters in difference to one Dickens, charging that the defendants would not permit him to proceed with the reference.

Pleas (by defendant *Childs*, dated 4th January, 1862): 1. Not guilty.

2 (to the first and second counts). A reference to arbitration of Dickens, and an award duly made on the matters in difference.

3 (to the *third* count). Denying the breach.

Pleas (by the other defendant, one Prudence): not guilty, &c., but *not* pleading the award.

Baylis for the plaintiff.

Overend for the defendant Prudence.

Gibbons for the defendant Childs.

It appeared that the defendants and the plaintiff had bought some cattle together, the plaintiff having nine and the defendants two; that the plaintiff had engaged a truck for his cattle, the truck only being large enough to hold his, and that the defendants had put in their two oxen. The result of which, on the plaintiff's evidence, was, so to crowd the plaintiff's cattle that they were found, at the end of the journey, very much injured and deteriorated in value.

At the close of the case for the plaintiff, on the first two counts, no evidence having been given on the third,

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Overend submitted that there was no cause of action.

MARTIN, B., held that there was a case for the jury (*a*).

Overend then applied, on the part of the defendant Prudence, for leave to add a plea of the defence founded on the award; but

MARTIN, B., refused the leave (unless on condition of paying all the costs), the case having been on the paper a week, and thus a great expense caused to the plaintiff in keeping his witnesses in town, so that the application was much too late.

The defendants' case was then gone into.

The submission to arbitration was conditioned for the making of an award on or before the 31st October; and a document bearing that date, and purporting to be an award for 8*l.*, was put in, and proved by the arbitrator.

The cross-examination went, however, to show that the arbitration had not been really completed, nor the award delivered, on that day; and the *stamp* on the award, a 2*s.* 6*d.* stamp (*b*), was dated the 27th February.

MARTIN, B., pointed this out; suggesting whether a stamp could be affixed (without a fine) more than six weeks after the making of the instrument (*c*).

[The award being dated the 31st October, the action was commenced on the 6th December, and the pleas were pleaded on the 6th January; the stamp bearing date the 27th February.]

(*a*) The case of *Williams* v. *The East India Company*, 3 East, 193, is one of a class of cases which show the action to be maintainable; and *Lumley* v. *Allday*, 1 Cro. & Jer. 301, shows, that it is not for the Judge, at the trial, to nonsuit, if the declaration is *proved*, however bad it may be.

(*b*) *Vide* 23 & 24 Vict. c. 111.

(*c*) See Tilsley's Stamp Laws, p. 288, "The instrument must bear the true and proper date, and such date be within six weeks preceding the stamping." Then the instrument may be stamped, without a penalty. There was no penalty paid in this case.

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At the close of the case,

MARTIN, B. (to the jury).—As to the original cause of action, it is for you to say whether the injury to the plaintiff's cattle was caused by the act of the defendant in putting in his.

As to the award, pleaded by *one* of the defendants, the fact that *one* alone of them has pleaded it, along with the dates, must throw some doubt on it; but if it was made as alleged, then it affords *him* a defence, and it is for you to say whether it *was* so made and delivered on the day on which it bears date.

Verdict for the plaintiff against both defendants, damages 18*l*.

Middlesex Sittings. Hilary Term.

On a condition in a policy, that it should be void if the assured should "*omit* to communicate any matter material to be made known to the insurer:—*Held*, that this meant some matter, not only material, but also unknown to the insurers; and that it did not apply to something which it might well be presumed was known to them or their agents(*a*).

PIMM *v.* LEWIS.

ACTION (against the Union Insurance Company) on a fire policy, the insurance being on the stock in trade in a water corn-mill.

[One of the articles was, that "to *prevent fraud*," if the assured should describe his buildings, manufactory, trade or goods, in any manner different from what they really are, so that the same be charged at a lower rate than they otherwise would be, or shall misrepresent, or *omit to communicate* any matter material to be made known to the company in order to enable them to judge of the risk, the policy should be void.]

Pleas: 1. Denying the making of the policy.

2. That the property insured was not truly described.

3. That the plaintiff omitted to communicate to the company a matter material to be made known to them, in order to enable them to judge of the risk, viz., that he was

(*a*) See a similar ruling of ERLE, C. J., in the case of a *marine* policy, *Foley* v. *Tabor*, *ante*, p. 663.

in the habit of grinding and would grind in the mill *rice-chaff*.

4. That there was an alteration in the risk *near to the* premises insured, so as to increase the risk, viz., by stowing rice-chaff in or near to the premises insured.

Sir *William Atherton*, A.-G., and *Udall* for the plaintiff.

Hawkins and *Keane* for the defendant.

The policy was effected in 1857. For some years previously part of the premises had been used as a mill for the grinding, not only of corn but of the "offal" of corn, i. e. the pollard or finer part of the husk, and also of rice-chaff, the husk of rice. In that year, however, and *after* the policy, the *other* part of the premises, previously used as a chocolate mill, was applied to the grinding of rice-chaff. The business had been always carried on openly and publicly, and it appeared to have been always known in the neighbourhood that rice-chaff was ground at the mill. One Barker, the agent for the company at the place where the mill was, went to look at the premises when the proposal was made, he made no particular inquiries, but appeared to know what the mill was. No questions were asked as to rice-chaff or what was ground at the mill, and no statement on that point was made by the assured. The proposal was simply to insure the stock in trade at the plaintiff's water corn-mill.

Hawkins contended that this was not a true description of a mill at which the offal of corn was ground, at all events, where *rice-chaff* was ground. And he called scientific witnesses to prove that rice-chaff was far more inflammable than pollard, and also officers of insurance companies to prove that the risk was on that account deemed greater and the premium required higher. But these witnesses only spoke from hearsay or vague impression, and the scientific witnesses only from analysis of the substance of rice-chaff as compared with flour, not with pollard. There

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was no *practical* witness on behalf of the defendants to prove that the grinding of rice-chaff was more perilous than the grinding of pollard, nor that a mill for the grinding of pollard as well as corn might not be fully and truly described as a corn-mill. On the other hand, various practical witnesses on the part of the plaintiff proved that a corn-mill was properly for the grinding both of the corn and the husk, and that the grinding of the pollard or corn husk was not more dangerous than that of rice-chaff.

MARTIN, B., thought that the only plea which the defendants could possibly rely upon was the third.

Hawkins, as to that, contended that as it was not pretended that the plaintiff, the assured, had stated that rice-chaff was to be ground, there had been an omission to communicate "a matter material to be made known to the company;" but

MARTIN, B., told the jury that this condition clearly meant something was material to be known to the company and which was *not* known to them or their officers. Here, however, the matter *was* known to them. The mill had been used for years for the grinding of rice-chaff, and used publicly and openly, and the company's officer resident in the neighbourhood well knew the mill. Did the plaintiff, then, "*omit* to communicate the matter which he might well presume they knew?" It all turns on that, for there is no pretence for imputing misrepresentation, as the defendant made no representation at all. Was the matter, however, material to be known "to the company?" Unless it was material there could be no defence on any ground.

Verdict for the plaintiff.

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Court of Exchequer, Guildhall, coram Bramwell, B.

MASTERS *v.* HENRY.

London Sittings. Hilary Term.

If the vendor of goods makes a tender which is fraudulent as against him, a reasonable time has then elapsed, and a new tender will be too late: *aliter*, of a mere mistaken tender, which (within a reasonable time) may be corrected.

DECLARATION, that the defendant had contracted to buy of the plaintiff certain seed.

Averment, that the plaintiff tendered the said seed.

Breach, that the defendant refused to receive it.

Plea: *inter alia*, denying the tender.

Day for the plaintiff.

Lloyd for the defendant.

The contract between the parties was for the sale of seed, the produce of seven acres. Before the time at which the plaintiff was *bound* to deliver, he sent to a railway station, addressed for the defendant, certain seed, the produce of *eleven* acres and a half, all in sacks of the same sort belonging to the plaintiff, and not so marked as that the produce of the *seven* acres could be distinguished, the defendant, finding that (as he said) the seed was so "complicated together," refused to receive any of it. The case for the defendant was, that the tender was fraudulent. There was, on the part of the plaintiff, an attempt to set up a subsequent tender of the right quantity; but

BRAMWELL, B., told the jury that the sole question for them was, whether the first tender had been fraudulent; for if so, then, as against the plaintiff, a reasonable time had then elapsed for him to make a tender, and a subsequent tender would be too late; did the plaintiff then, wishing to force the defendant to take more than he had bargained for, unfairly tender the large quantity? If so, they should find for the defendant.

Verdict for the plaintiff (*a*).

(*a*) *Lloyd* got a rule, but not for misdirection; and *Day*, on showing cause, raised the question whether there had been misdirection as against *him*; but the Court thought *not*. The rule was absolute for a new trial *as against evidence*; but the case was not tried again.

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Coram Pollock, C. B.

London Sittings. Hilary Term.

JACKSON *v.* HARRISON.

Seed-crushers, who sold their refuse oil cake to graziers, without describing it or selling it as fit for the food of cattle, nor even knowing that it was bought as such:— *Held*, not liable, on an implied warranty that it was so, for the consequences of their being fed with it.

DECLARATION, that in consideration that the plaintiff would buy of the defendant certain oil cake, for feeding cattle, the defendant promised the plaintiff that the said cake was fit and proper for the purpose of feeding cattle, whereas it was not so, but unfit and improper for the same, whereby divers of the plaintiff's cattle fed thereon died.

Plea: denying the warranty.

Digby Seymour and *Ballantine*, Serjt., for the plaintiff.

Forsyth and *J. Brown* for the defendant.

The plaintiff was a farmer and grazier, who used to feed his cattle with oil cake, and had bought some from the defendant for that purpose before. The defendants were seed-crushers, and sold the refuse cake produced in the process of seed-crushing in its crude and natural state, just as it came from their mills, to farmers as oil cake, but without any description as cattle food, or any express or actual warranty as such, and without so far as appeared anything being said as to its use. The plaintiff had bought a quantity of this refuse oil cake, without saying that he wanted it for the feed of cattle, and without its being described as such. It did not even appear that the defendants knew that the plaintiff was going to use it as food for cattle, at all events, in its crude state, as he bought it from them. He did, however, so use it, and several of the cattle died. It was proved that they had died in consequence of the crude, harsh, nature of the cake, the particles of which, not being triturated or softened, acted injuriously on the coats of the animals' stomachs, and so, not by chemical but mechanical action, caused their deaths. There was nothing in the cake, in any other way than this, of a deleterious character.

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Upon this evidence at the close of the plaintiff's case,

POLLOCK, C. B., said, there was no evidence of any warranty. The case was very different from that of a person who professed to manufacture and sell food for cattle, or sold cake expressly for that purpose. The defendant only sold the cake, the refuse of his crushing-mills, just as it was after the oil was expressed from the linseed. It was for the plaintiff to see if it was fit for feeding his cattle or not. There must be a verdict for the defendant.

On this the plaintiff yielded to a

Nonsuit (*a*).

(*a*) The case is clearly different from that of *Black* v. *Elliot*, Vol. I., p. 595, where the defendant was held liable for the poisoning of sheep by a sheep-wash he sold *as such*, and for the purpose of washing sheep, and through the use of which they died.

Coram Bramwell, B.

PIMM *v.* ROPER.

London Sittings. Hilary Term.

The defendant, a surgeon, having been employed by a railway company to examine the plaintiff, one of their passengers, who had sustained an injury in a collision on their line, and he having, so far as he could see or judge, on the plaintiff's statement of his injuries, told him that they were so slight that he accepted a small sum in compensation:—*Held*, even assuming that his injuries were greater, there was no ground of action.

DECLARATION, that in consideration that the plaintiff, at the request of the defendant, would employ the defendant as a surgeon (not alleging for *reward from the plaintiff*), to examine the plaintiff, for the purpose of ascertaining the extent and nature of certain injuries theretofore sustained by the plaintiff, and for which he was entitled to claim compensation, the defendant *promised the plaintiff* to use due care and skill in and about examining him, and ascertaining (not in *stating to the plaintiff*) the true nature and extent of the injuries sustained by the plaintiff.

Averment: that the *plaintiff employed* the defendant on the terms aforesaid; that the defendant *entered* on such employment; that the defendant did not use due care,

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&c., whereby the plaintiff was led to believe that he was but slightly injured, and was induced to and did accept small compensation, whereas he was seriously injured, and entitled to much larger.

Second count, for a *fraudulent* representation.

Pleas: 1. Denying the contract as alleged.

2. That the *plaintiff* did not employ the defendant, nor did the defendant enter on *such* employment as alleged.

3. That the defendant *did* use due care, &c.

4. Not guilty.

5. That the plaintiff was *not* so injured as alleged.

Day for the plaintiff.

Pigott, Serjt., and *Holland* for the defendant.

The plaintiff had been a passenger on the Eastern Counties line, in a train which met with a collision, in which he was somewhat hurt. At the station he was sent by the railway company's servants to the defendant, *their* surgeon, who asked him where he was injured, to which the plaintiff answered in his face and arm, his face being then bleeding from a blow which did not turn out to be serious. The defendant made the usual applications for those visible hurts, and on his next visit, considering that, as he said, he was more frightened than hurt, he sent him to certain of the company's authorities, who gave him 5*l.*, for which he signed a receipt as taken in satisfaction. Next day he came again, and got the defendant to examine his abdomen, where he professed to have been injured, and on this it was discovered that he was ruptured. The plaintiff applied for further compensation, which was refused, and he then sued the company for the injury. They pleaded the receipt of the 5*l.* in full discharge, and he replied fraud. The case was tried before MARTIN, B., who directed the jury that there was no evidence of fraud, and the company had a verdict. Thereupon the present action was brought against the defendant, the surgeon,

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who had never been paid or retained by the plaintiff, nor agreed to *tell him* what his injuries were; nor did it appear that he had been told by the plaintiff before the receipt of the 5*l.* that he had any external hurt, otherwise than what was visible; and although the plaintiff said he had complained of his bowels, he did not say that he had told the defendant there was anything *apparent* in his abdomen, or any external symptoms of injury. And at the former trial the case for the company was, that the rupture was an old one.

On the plaintiff's evidence,

BRAMWELL, B., said there was no proof, either of a contract *with the plaintiff*, nor of any injury sustained by him, as a result of any neglect on the part of the defendant to examine him (the only duty laid or proved). There was, therefore, no ground of action, and consequently the plaintiff must be

Nonsuited (*a*).

(*a*) This case is not at all at variance with those which show that if a stranger retain a surgeon to tend a person, the surgeon is liable to that person for want of due and proper care. But that action would be founded on injury, the result of *negligence*, of which, in this case, there was no evidence; i. e. neither of the negligence nor of any injury, the result of it. Even assuming a duty to the plaintiff duly to *examine* him, there was none even *alleged* to *state* to him the result; and it was to the want of *knowing* the result, (even supposing his injuries were as he stated,) that his acceptance of the 5*l.*, on his own *showing*, was to be ascribed.

Coram Pollock, C. B.

HORSFALL *v.* THOMAS.

London Sittings. Hilary Term.

ACTION on a bill of exchange drawn by the plaintiff on, and accepted by, the defendant.

It is no defence to an action on a bill drawn by the plaintiff for the price of an article made

Pleas: 1. That the bill was given as the price of a gun, and delivered to his order, and accepted and used, that there is a flaw in it, which was known to, and concealed by, the maker, but which might have been discovered by the buyer.

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warranted to be sound; that it was not sound, and of no value.

2. Similar; but on a failure of consideration.

3. That the plaintiff induced the defendant to accept the bill by means of fraud.

Edward James for the plaintiff.

Bovill and *Honyman* for the defendant.

Issue being on the defendant.

The defendant had ordered a gun to be made on a certain principle of his, for the purpose of exemplifying it, with a view to experiments upon it by the Ordnance.

The gun was made upon his principle, and in the course of making it the plaintiff informed him of some minor defects in it. When it was made, the defendant came down to look at it, but as the rifling machine was in it, he could not see its inside.

On the 2nd of July it was sent by his orders to Woolwich, and on the 5th of July he sent the bill of exchange.

The gun was fired several times, and answered satisfactorily, and served to exemplify the defendant's principle. It was afterwards fired six times, with increasing charges of powder, in order to test it; at the seventh it burst.

And evidence was offered to show that this was through a flaw in the gun, into which a plug had been found inserted. [There was no evidence *when* the plaintiff became aware of the flaw.]

Upon this evidence being opened,

POLLOCK, C. B.—There is no defence, either on the ground of failure of consideration, or fraud (*a*). The gun

(*a*) As to the special pleas, upon a warranty,—on the sale of a specific article, as a machine, made or to be made on a specific principle, there is no warranty that it will answer the object (*Oliphant* v. *Bailey*, 5 Q. B. 288; *Parsons* v. *Sexton*, 4 C. B. 899); so that its unfitness for the purpose is no *defence* to an action for the price, nor any answer

had to some extent already answered its purpose. And the defendant could have examined it. *Any gun will burst at last* (*a*).

Verdict for the plaintiff (*b*).

to an action on a *bill* for it, as there might be if there were a breach of warranty, or the article was not what was bought, as if not according to sample; *Camac* v. *Warriner*, 1 C. B. 356; *Hooper* v. *Treffrey*, 1 Exch. 17. But this has never been held of *soundness*; and *semble*, that there is an implied warranty of soundness, by the *maker* of anything, and against flaws he *knows* of; and here the plug showed that the flaw was known and *concealed*. The flaw ordinarily would sustain an action for a breach of *warranty*, apart from fraud, if it made the gun unfit for ordinary use; for there is always a warranty by a maker, that the article is sound and fit for *ordinary* use (*Brown* v. *Edginton*, 2 M. & G. 279; *Shepherd* v. *Pybus*, Ibid.; 4 Sc. N. R. 434); but not that it is fit for the purpose for which the *buyer* designed it, even although the maker *knew* it (Ibid.); and of course this must be *à multo fortiori*, where, as here, the gun was made on the *buyer's* plan and principle. For it is so even when the article is made on the *seller's* principle, if it is a *specific* article; *Prideaux* v. *M'Murray*, *ante*, p. 225. Now, here, there was no proof that the gun was unsound to such an extent as to be unfit for ordinary use; on the contrary, there was proof that it was *not* so; for it was fired six times, and burst only on increased charges of powder, and this might have been through the fault of the *buyer's* own principle of construction; and if so, then, though the maker even *knew* it, there was no defence. In regard to fraud, there must not only be evidence of fraud, but that *thereby* the buyer was induced to purchase. There was no proof of fraud, for the reason above stated, (for concealment does not prove fraud); and there was no evidence of any false statement to defendant, still less of any which induced him to accept. See *Clark* v. *Holmes*, p. 79, as to the *onus* of proof.

(*a*) It could not possibly be proved that it burst *by reason* of the flaw, as it might have been if it had burst the *first* time, or the charges had all been *ordinary*. There was only, at utmost, an implied warranty that it was sound for *ordinary* charges; *vide supra*.

(*b*) Upheld by the Court, E. T.

1861.

NORTHERN CIRCUIT.

York, coram Wightman, J.

REGINA *v.* BURTON, SCOTT AND LOCKWOOD.

Winter Assizes.

Where there are several prisoners, and they sever in their defences, if one should call witnesses and the others not, the right of reply is now in practice confined to the case against the prisoner who has called witnesses.

THE prisoners were indicted for a burglary.

Middleton and *Bruce* for the prosecution.

Shepherd for the prisoner Scott; the other prisoners undefended.

No witnesses were called by Burton and Scott, but Lockwood called witnesses to prove an *alibi*. Thereupon

Middleton claimed a right to a general reply as against all the prisoners.

Shepherd objected, admitting that, according to the old rule of practice, *Middleton* had, perhaps, a right to do so; but Judges had latterly regarded the assertion of such a right as unfair, and that the reply should, in fairness, be confined to the case of the prisoner who had called witnesses.

WIGHTMAN, J., (addressing *Middleton*).—You had better confine your remarks to Lockwood's case (*a*).

(*a*) See *Reg.* v. *Hayes*, 2 M. & Rob. 155; *Reg.* v. *Jordan*, 9 Car. & P. 118.

REGINA *v.* HOLMES.

Winter Assizes.

Quære, as to the value of testing the religious belief of young children, as their testimony is open to observation.

DAVID HOLMES was indicted for a rape on Ellen Ann Horner, a child of the age of six years.

The child, on being placed in the box, was about to be sworn, when

Middleton, for the prisoner, asked if his Lordship would not consider it his duty to test the competency of the witness.

HIS LORDSHIP (to the witness).—Is it a good thing or a bad thing to tell a lie?

Witness (after some hesitation).—A bad thing.

HIS LORDSHIP.—I think the evidence admissible.

Middleton.—It is laid down in the books of authority that the witness must understand the nature and obligation of an oath.

HIS LORDSHIP.—That is a complicated question, which nine out of ten children could not answer. (To the child.) Do you say your prayers?

Witness.—Yes.

HIS LORDSHIP.—What becomes of a person who tells lies?

Witness.—If he tells lies he will go to the wicked fire.

HIS LORDSHIP. I think her evidence admissible. I do not know that it really advances the credibility of testimony to put such questions. The testimony given is open to observations to be made upon it as to its value.

The witness was then examined, and gave her evidence (*a*).

(*a*) At the last Spring Assizes for Surrey, 1862, the same learned Judge, in the case of an infant witness about the same age, put the same question—"Is it a good or a bad thing to tell a lie?" and on his answering that it *was* a bad thing, admitted him to give evidence. In *Madan* v. *Catanach*, 10 W. R. 112, what will *exclude* evidence appears to be, an avowed *disbelief* in a state of rewards and punishments, and it is left doubtful whether even an adult witness can be interrogated as to religious belief. An infant cannot, under any circumstances, be admitted to give evidence, *except* upon oath; *Rex* v. *Powell*, 1 Leach, C. C. 110. A person who has no notion of eternity, or of a future state of rewards and punishment, cannot be examined as a witness, but the trial may be postponed until the witness is instructed in the nature of this obligation; *Rex* v. *White*, 1 Leach, C. C. 430.

1861.

Coram Keating, J.

REGINA *v.* HARGREAVES.

A prosecutor who has required the magistrates to take his recognizances to prosecute, on a charge within the 22 & 23 Vict. c. 17, s. 2, when the magistrates have refused to commit the person charged, must either go on with the prosecution or have his recognizances forfeited, as it would defeat the object of the statute if he were allowed to move to have his recognizances discharged.

IN this case the magistrates had refused to commit the prisoner on a charge which was within the provisions of the 22 & 23 Vict. c. 17; and the prosecutor thereupon, under the 2nd section of that act, required the magistrate to take his recognizance to prosecute on the charge, in order that he might prefer his indictment before the grand jury at the assizes (*a*).

Wheelhouse now applied to discharge the prosecutor's recognizances herein on the part of the prosecution.

KEATING, J.—Under the 2nd section of the statute, notwithstanding the magistrate refuses to commit, the prosecutor insists on going on; and under that section, on entering into his recognizances, the magistrates are by that statute bound to take them, and he cannot now be discharged from his recognizances; he must either go on or have his recognizances forfeited. To hold that he might be discharged from his recognizances would be defeating a very useful act of parliament.

(*a*) The 2nd section of the 22 & 23 Vict. c. 17, provides that, "Where any charge or complaint shall be made before any one or more of her Majesty's justices of the peace, that any person has committed any of the offences aforesaid [i. e. perjury, subornation of perjury, conspiracy, obtaining money or other property by false pretences, keeping a gambling house, keeping a disorderly house, and any indecent assault] within the jurisdiction of such justice, and such justice shall refuse to commit, or to bail the person charged with such offence, to be tried for the same, then, in case the prosecutor shall desire to prefer an indictment respecting the said offence, it shall be lawful for the said justice, and he is hereby required to take the recognizance of such prosecutor to prosecute the said charge or complaint, and to transmit such recognizance, information and depositions, if any, to the Court in which such indictment ought to be preferred, in the same manner as such justice would have done in case he had committed the person charged to be tried for such offence."

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Coram Willes, J.

WELLOCK *v.* CONSTANTINE.

Spring Assizes.

In an action by a woman, in which the declaration charged that the defendant assaulted her and forcibly violated her, and in which she swore to a rape; the Judge held that she could not recover, as the matter was one of criminal cognizance, and it did not appear that there had been any *prosecution*.

THE declaration stated, that the defendant assaulted and beat the plaintiff, and *forcibly violated* her, and carnally knew her (*a*), whereby she became with child, &c.

(*a*) This is not an indictment for rape, (even though the words "forcibly violated" were in substance of the same *effect* as "rapuit," and the word "feloniously" only a technical term, where the rest of the indictment charges the *facts* necessary to constitute the offence;) for it claims *damage*; and so there was jurisdiction under the commission of *nisi prius* to try it, (i. e. as an issue of damages, which is necessarily incident to a civil suit), whether or not there was also jurisdiction to try it under the commission of oyer and terminer, as an inquisition or presentment preliminary to an indictment. It cannot, therefore, be said, the nonsuit was wrong; as if the Judge had no jurisdiction to direct a verdict, then, on the same principle, the Court could have no jurisdiction to direct a new trial. In cases where the defendant justifies upon a felony by the plaintiff, it has been held, that the verdict for the defendant operates as a presentment or indictment by a grand jury. There, as here, there is jurisdiction to try the issue, as a crime of another may be a *defence*. That the point arises on the general issue (whether or not it *also* arises on the record) appears from this, that the declaration always implies, what formerly was *expressed* in the allegation, that the tort was *to the damage* of the plaintiff, i. e. under such circumstances as to give a claim to damages, which, indeed, is of the essence of the civil action. And if by a rule of law it is *not* so, this will sustain a verdict for the defendant, the allegation of right to recover damage being disproved; just as where, in cases of slander, privileged, the allegation of malice is disproved, or the allegation of special damage is essential, and it is not shown. And, even putting it no higher than that an action is premature, the case would resemble that of credit unexpired, which, whether or not it arise on the record as it *may*, can also be raised on the general issue. So of an action for malicious prosecution brought before the criminal proceedings are ended; whether or not it is *alleged* and denied that they are, so, on a principle of public policy, it would appear that there was no right of action. It is no difficulty that a verdict for the defendant on that ground would be *final*, as the plaintiff may *avoid* such a verdict by electing to be nonsuited.

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Plea: not guilty.

Overend and *Jones* for the plaintiff.

Price for the defendant.

Overend, in opening the case for the plaintiff, did *not* state it as a case of rape, but said that probably she would go beyond the mere charge of an assault, and that a gross and barbarous assault no doubt had been committed, resulting in childbirth, and thus causing great damage.

The plaintiff was called, and stated that the defendant had seized her, thrown her down, and at once violated her. She described it as all one continuous act, and swore positively that it was against her will. On cross-examination, she said it was a rape, but admitted matters which went to discredit this statement, as she not having at once complained, &c.

The father of the plaintiff was called, and it appeared that when she had complained to her mother a conversation took place between all parties, in which he stated that if a child did not come, he would say nothing more about it; but that if his daughter had a child, he should expect some amends.

Upon this evidence,

WILLES, J., said that the charge was one of rape, or it was nothing; and though, as there was no corroborative proof, most likely in a criminal court the defendant would be acquitted, yet, as the *charge* was clearly one of rape, it was contrary to public policy to allow it to be made the subject of a civil action until it had been the subject of a criminal prosecution. The plaintiff, on her own showing, can only recover by proving a rape; for if she consented, then it is clear that *she* cannot sue for seduction (*a*). But

(*a*) That if she consented at any time, it was not a rape. See *R.* v. *Fletcher*, 28 L. J., M. C. 85. That if it was not so, she could sue for the *assault before* her consent. See *Desborough* v. *Holmes*, Vol. 1, p. 6. *Sed quære*, even as to that; the act being *entire*.

if she did *not* consent, and it was all against her will, then it is a rape, and it is contrary to public policy to allow it to be made a matter *merely* of civil suit for damage. The plaintiff, therefore, must be called, or I must direct a verdict for the defendant.

Thereupon *Overend* yielded to a

Nonsuit (*a*).

(*a*) In Easter Term, *Overend* got a rule in the Exch, which was argued in Trinity Term. The Court did not deny the general principle, that, in a case of felony, there cannot be a civil suit against the *felon* before a criminal prosecution (*Crosby* v. *Leng*, 12 East, 409), but doubted whether the question arose on the *general* issue, and whether the proper course was to direct a *verdict for the defendant*, or to discharge the jury and strike out the cause. As to the first point, it is conceived that the matter is not one of mere *defence* on the part of the defendant, but is to be raised by the Judge in the interests of public justice,—paramount to both parties, and—the very mischief being the compromise of criminal charges,—it is obvious that the defendant, the felon, is not likely to plead it; and in ancient times, when all felonies were capital, parties were still less likely to do so. There is no instance of any *plea* raising the question, and it is always stated as *appearing to the Court* upon the evidence. And, it is conceived, it is for the Judge whether there is a *charge* of rape (not whether it is *proved*); and that, if so, it is for him, as a matter of *law*, to direct a verdict, even though he has a *discretion* to discharge the jury.

Newcastle, coram Willes, J.

LAWSON *v.* BURNESS.

Spring Assizes.

ACTION on shipowner on a charter-party, by which the ship was to proceed to Tyne Dock, and there load in the customary manner, from the agents of the charterer, a full and complete cargo of Marly Hill coke (with sufficient coal for ballast), to be loaded in regular turn. Breach: that the ship did not load in regular turn, but was delayed in loading a long and unreasonable time, to wit, fifty-four days, for which demurrage was claimed.

Second count, for demurrage.

When a ship has been chartered to be loaded in "regular turn," it is for the jury, as between shipowner and charterer, what "regular turn" means, and it will not mean merely the usage of the place of loading, unless it is known or established.

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Pleas: *inter alia*, in denial of the breach, and also never indebted.

Edward James and *Heath* for the plaintiff.

Manisty and *T. Jones* for the defendant.

It appeared that the charter was made on the 24th of October, and that on the 30th of October the ship, having gone to Newcastle to get her coal, the master saw the manager of the Marly Hill Colliery, and told him he was to load there coke. On the 7th of November the master, having taken the coals on board, saw the manager, and told him so, and that he was ready to receive the coke. The coke was not loaded, and on the 2nd of December the master saw the manager again, and asked why it was, and was told there were several ships on the "turn" before his, which were in course of being loaded. He was also told that several ships which had not been ready had now got ready, and that his could not be loaded that week, nor the next. He saw the manager again on the 15th of January, but could not get loaded, nor did he begin to receive his cargo until the 20th of January, nor complete it until the 25th. [Demurrage was claimed from the time the coal was in, and the ship ready to receive the coke, i.e. from the 7th of November to the 20th of January, deducting a fortnight.]

The plaintiff's evidence was, that it was usual to be loaded within a fortnight. The master, however, could not say what was the reasonable number of vessels to be loaded, and admitted that the "turn" varied according to the number of vessels ready to be loaded, and the time was sometimes longer and sometimes shorter. He knew there was a book kept at the colliery, in which were entered the names of the ships to be loaded, but he had not looked at it to see what ships were entered. He had only asked the usual time, and was told it was about a fortnight. He took in the coal, without making any inquiries

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as to the number of ships waiting to be loaded. The book was kept by the colliery for *its own purposes*. It did not appear that it was generally known, but evidence was tendered for the defendant that it was so, and the witnesses for the defendant stated that it had been kept for twenty years, and that vessels had, during all that time, been loaded in their "turn," according to the order of their entry in the book. But it appeared that ships were entered therein, not only before they were ready to load, but before their arrival at the dock, or even at the port, and that if a ship was not ready in its turn, it was allowed to come in when it was ready, even before others which had been ready before it. The defendant's witnesses, however, denied any preference or priority. And it appeared that the Marly Hill Company were the only makers of the Marly Hill coke, and that they only allowed vessels to load it at their "spout," according to the "turn" in their book.

WILLES, J. (to the jury).—What is the meaning of the words "regular turn?" Common sense implies what is *reasonable*, "first come, first served." Does the colliery book make any difference? Consider what is the reasonable order of loading, whether it is according to the book, or in the order in which the ships are ready? If the latter, then the book goes for nothing. There may be another question—What is a reasonable *time?* All the circumstances are to be considered. First, was the vessel loaded in its regular turn? If not, how much time was lost?

The jury found that the ship was loaded according to the colliery order, but that the usage was not known and established, and that "regular turns" meant the order in which the ships were *ready, not* according to the colliery book.

Verdict for the plaintiff (*a*).

(*a*) A rule was granted in the Exchequer, but discharged on argument.

1861.

Liverpool, coram Crompton, J.

HIGGINBOTHAM *v.* THE GREAT NORTHERN RAILWAY COMPANY.

Summer Assizes.

In an action against carriers for damage to the goods carried, it is enough for the plaintiff to prove the condition and value of the goods when delivered to them and when received by him, and if damaged in their hands he is entitled to recover, and the fact that the damage was partly caused by bad packing goes only to the amount of damage.

ACTION against the defendants, as carriers, for not safely conveying certain goods of the plaintiff, but carrying them so carelessly that they became greatly damaged.

Plea: not guilty.

E. James for the plaintiff.

S. Temple for the defendants.

The plaintiff, in Manchester, had purchased of a person in Manchester a quantity of paper worth 70*l.*, in packages, lying at a warehouse in London. They were sent from London by the defendants' railway on the 9th March, consigned to the plaintiff at Manchester, where they arrived on the 13th, and lay at the company's warehouse until taken away by the plaintiff. In order to prove that the paper, when sent, was in good condition, the seller was not called, but a person who had been employed in the warehouse where it had been packed in London, and who stated that he had seen it, from time to time, and saw that it was safe and in merchantable condition; but it did not appear that he had unpacked or examined any part of it, and he spoke only from merely looking at the packages piled up to the ceiling. Nor was there any evidence how the paper had been originally packed.

The receipt of the paper by the railway company was proved by the signature of a railway porter in a book; and it appeared that if goods so received were not in good condition, it was usual to make a mark or note against the entry in the book, and there was no such mark or note in the present case. It was, however, admitted by the carrier who took the goods to the station, that the porter who received them said they were not in good condition, and

were "a loose lot." There was some evidence that the paper was badly packed; but this defect of paper package was visible and apparent, and might have been remedied if pointed out.

The goods, when delivered to the plaintiff, were much damaged and deteriorated in value.

At the close of the case for the plaintiff,

Temple submitted that there ought to be a nonsuit; but

CROMPTON, J., thought there was a case for the jury, though there was no direct evidence of any act of negligence on the part of the company's servants.

At the close of the case for the defendant,

CROMPTON, J. (to the jury).—The question for you is, first, was there any damage to the goods while they were in the defendands' hands as carriers? [To this the jury answered in the affirmative.] Secondly. Was such damage owing, *partially*, to the state in which the goods were delivered to the defendants? [To this, also, the jury answered in the affirmative.]

The learned Judge thereupon directed the jury that they should find for the plaintiff for *such* damages as they thought had been caused by the want of care on the part of the defendants' servants.

The jury accordingly found a

Verdict for the plaintiff, damages 40*l.* (*a*).

(*a*) In Hil. Tern, 1862, *Temple* moved, in the Exchequer, on the ground of misdirection, and also that the verdict was against the evidence. But the Court refused a rule on either ground, conceiving that there was evidence of damage to the goods through want of due care on the part of the defendants, and that the learned Judge had given them the full benefit of any want of care in the packing, which went merely to the *damage*, and not to the cause of action; the damage having only been *partially* caused thereby.

1862.

Liverpool, coram Willes, J.

KIRKWOOD *v.* CHEETHAM AND ANOTHER.

Spring Assizes.

A person getting his paid servant to carry on business under the name of a *firm* as merchants, *held* jointly liable with him for goods ordered by the servant in the way of the business.

ACTION against Cheetham and Smith for the price of goods sold.

Smith had allowed judgment by default, and Cheetham pleaded never indebted as alleged (*a*).

Deighton for the plaintiff.

Monk, Q. C., and *Williams* for the defendant.

The defendant Cheetham, a butter-dealer near Manchester, had got the co-defendant Smith, his paid servant, to take a warehouse there, and start in business under the name and firm of "Smith & Company," as "*merchants.*" And the goods in question (butters) had been supplied there, on the orders of Smith, by the plaintiffs, merchants at Liverpool, who knew nothing of the co-defendant Cheetham.

The case for the latter was, that he had no partnership with Smith, and that Smith had no authority from him except to *sell*, and not to buy.

WILLES, J. (to the jury).—Was Smith Cheetham's agent only for the limited and partial purpose suggested, or was he *his general* agent to carry on the business?

Verdict for the defendants (*b*).

(*a*) That is, never *jointly* indebted. But *vide post.*

(*b*) Set aside in Exchequer (Trinity Term), on the ground that it was against the evidence, regarding the case as one of principal and agent, and that, though not partners, the defendants were *jointly* liable; Smith, as holding himself out as a partner, and Cheetham as the real principal. There were letters in which this appeared to be the case.

MIDLAND CIRCUIT.

Leicester, coram Williams, J.

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Leicestershire Spring Assizes.

PARKINS ET UXOR *v.* SCOTT ET UXOR.

Whether an action lies for slander founded on special damage arising from the repetition of the slander, depends on whether the repetition was in the performance of a *duty*.

DECLARATION for slander. The words alleged were, "You are a whore * * *," meaning thereby that the female plaintiff was an unchaste woman, and had committed adultery.

Special damage, that in consequence of the slander the husband withdrew from her society, and refused to cohabit with her.

Plea: not guilty.

O'Brien, Serjt., and *Cockle* for the plaintiffs.

Hayes, Serjt., and *Field* for the defendants.

The words were spoken to the wife of the plaintiff in the course of an altercation, while the husband was absent from home. He did not return until a week afterwards, and on his return the female plaintiff related to him all that had taken place, and his evidence was as follows:—"I remained with my wife from the Friday, when I returned, until the Monday morning following. After due consideration I felt very much hurt at what she had been charged with, the language being of such a foul description, that I thought some portion of it must be true, or otherwise they dared not have charged her with it. I talked the matter over with my wife between the Friday and the Monday, and at last told her that I had come to the conclusion to leave her until the matter was thoroughly investigated. I left on the Monday morning and have not been near the house since. I left in consequence of all that had

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PARKINS et Uxor v. SCOTT et Uxor.

been said, *particularly* what was said by Mrs. Scott." This closed the case for the plaintiffs.

Hayes, Serjt., then submitted that there was no case for the jury; no legal damage. It was slander of a married woman, by which it was alleged that she had lost the society of her husband. The damage must flow directly from the defendant's slander. If a person made use of slanderous language and a third person repeated it, it was not actionable; *Ward* v. *Weeks* (*a*). The husband heard nothing of the slander except through the report of the wife; the damage, therefore, was in consequence of the repetition of the slander, and not of the slander itself.

WILLIAMS, J.—Although the general law is as you state, I shall not stop the case, as it may be that the words were repeated by the wife in performance of a duty which she owed to her husband; if so it would be within the case of *Kendillon* v. *Maltby* (*b*). I will give you leave to move (*c*).

The jury found for the plaintiffs, damages 40*s*. (*d*).

(*a*) 7 Bing. 211.

(*b*) Car. & Marsh. 402.

(*c*) See *Wenman* v. *Ash*, 13 C. B. 836.

(*d*) *Hayes*, Serjt., made absolute a rule in the Exch. for a nonsuit on the authority of *Ward* v. *Weeks*.

Words imputing to a woman that she is a prostitute are not actionable without special damage, which, therefore, in such case, is of the essence of the action; *Wilby* v. *Elston*, 8 C. B. 142. And the special damage must appear to have been the result of the speaking of the words by the defendant; *Hopwood* v. *Thorn*, ibid. 293. For it is a *general* rule, as to damage in tort, that it must be the "natural and legal result of the wrongful act" sued for. Hence, if loss of custom, &c., be charged, the customers must be called, to prove that they withdrew the custom *by reason* of the *defendant's* speaking of the words; *King* v. *Watts*, 8 C. & P. 614; *Barnett* v. *Allen*, 1 F. & F. 127. *Et vide Dixon* v. *Smith*, 29 L. J., Exch. 125. A person who repeats a slander, unless he is justified or privileged, is himself liable; and one wrong cannot be the natural *and legal* result of another; whence it is, that if the wrongful act or omission of another party intervene, a man is not liable, civilly or criminally, for the result. See *R.* v. *Gregory*, *ante*, p. 153, and *R.* v. *Ledger*, *post*.

MIDLAND CIRCUIT.

Warwick, coram Cockburn, C. J.

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KENNEDY *v.* BROUN ET UXOR.

Spring Assizes.

ACTION on accounts stated with the wife before her marriage. The claim was 20,000*l.*

Pleas: 1. Never indebted (*a*).

2. Payment.

3. That the action is maintained for the recovery of charges for business done by the plaintiff as an attorney, &c. (*b*).

4. That the accounts were stated of and concerning monies claimed by the plaintiff for and in respect of work, journeys, care, skill and attendances done, bestowed and applied, and monies paid by the plaintiff for the defendant Patience while she was unmarried, in pursuance of divers illegal agreements before then made between them, for the unlawful maintenance by the plaintiff of the said

In an action, by counsel, on an alleged admission, as an account stated, of a pecuniary demand, arising out of promises of reward made by the client, pending a suit in which he had done services for her, partly within his province as counsel and partly not so; such reward to await the result of the suit and be paid on the event being in the client's favor:—*Held*, that though the question of an *actual* accounting was one of *fact* for the jury, the question whether such an arrangement was contrary to public policy, so that there was no legal or valid liability of which an account stated, or for which an action could have been brought, was one of *law* for the Court. And *held* also, that counsel, for services in and about and in aid of a suit, whether as counsel or not, cannot sue for reward, at all events, on an agreement to depend on the event.

(*a*) This put in issue the facts from which the *cause of action alleged* would be inferred, i. e. the existence of *debts* or demands, and the statement of an account of such debts, *Webber* v. *Tivill*, 2 W. Sa. 121 e. Supposing the original claims to have been such as *might* be debts, illegality would have to be pleaded. But if they in their own nature could not be debts, *that* defence would arise on the general issue.

(*b*) To sustain this plea there was not evidence, and it does not appear to have been relied on at the trial. *Vide post*, p. 811 (*a*). The real defence was, not that the plaintiff acted as attorney, but that he acted and agreed as *counsel*; as to which, *vide post*.

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KENNEDY v. BROUN et Uxor.

Patience (*a*), in and about divers actions, suits and proceedings at law and in equity touching and relating to certain lands, tenements and other property *claimed* by her (*b*),

(*a*) That is, maintenance in consideration of money to be paid.

(*b*) Not merely *claimed*, but held and possessed by her, and of which she was seised. Maintenance no doubt may be by maintaining a tenant as well as a demandant; but it is defined as maintaining a suit "to the hindrance or disturbance of right" (2 Inst. 208); therefore it will be maintenance in any one who *unlawfully* sustains or supports a tenant or demandant in a cause pending in a suit, by word, writing, countenance or deed (2 Inst. 208; Co. Lit. 368 b). And strangers retaining counsel may be guilty of it (2 Rol. 77), but *not the counsel himself*, merely by supporting the client; at all events, if not from an improper motive, unless the counsel *knows* that the client has no right. But even if the client had not, as in this case, gained judgment, it would hardly be in the client's mouth to say that she had been maintained "against right." And though, even after judgment, the *opposite party* might indict or sue for maintenance against a stranger who has supported the successful litigant, it would never be possible for the *successful litigant* to set it up unless as an answer to a claim for remuneration for the maintenance. *That* would come within the defence of maintenance (although it would be something more than maintenance) in the case of a stranger. But counsel cannot be deemed legally a stranger to a suit, or as *unlawfully* maintaining, unless the bargain for reward be so. That is something quite distinct from mere maintenance: in which the offence lies is the *maintaining*; so that if *that* is not *per se*, or by reason of the motive, unlawful, the offence of *maintenance* is not committed. The question, therefore, on this plea, would be, whether the agreement by counsel for money to be paid after, upon and dependent upon, the event of the suit being in favor of the client, makes counsel's maintaining the suit "unlawful," which would otherwise be clearly lawful. There was no evidence in this case of *anything else* to make it unlawful. It by no means indeed is a conclusion of law, at all events in considering the question of maintenance, from the fact that the event of the suit was in favor of the client, that therefore there was no legal wrong or injury to the *other party*; and *in law* the successful party might set up the defence to an action founded on a contract for money as the reward of maintenance, though she could hardly sue or indict for the maintenance itself. But the very mischief of maintenance is the encouragement of litigation, which though legally, as far as the *evidence in the suit* goes, is presumed to have reached a right result, yet, through defects of evidence, death or absence of wit-

and which in no way belonged to the plaintiff (*a*), and wherein he had no right, estate, title or interest (*b*), contrary to law, &c. (*c*).

nesses, and the like, the result may *not* be in accordance with justice and truth. And there was strong reason, from the evidence of the plaintiff himself, to suspect that that was so in the suit in question; since the success of his client, it is pretty clear, was the result of the absence of two witnesses, whose cross-examination would very likely have been fatal to his client. But though this might prove that the evil and mischief of maintenance had in fact arisen in this case (so far as regards the injury to the other party), there was no evidence that the result was owing to any contrivance of his; so that on that ground there was no evidence that his maintaining his client was "unlawful." And therefore the case would seem to have come to this, whether a bargain or understanding by counsel, pending a suit for reward to be paid by his client in the event of the suit being in favor of the client, made his maintaining her cause unlawful. And that, it will be seen, was the point on which the Lord Chief Justice put the case, and, as it is conceived, correctly.

(*a*) This allegation, however material to the *plea*, as one of mere maintenance, had little to do with the real ground of defence; and on the other hand, the allegation that there was no reasonable ground for the suit as regards the client's claim, which of course was not, as it could hardly have been, made on her behalf, would seem from the *later* authorities to *be* material to the plea as one of maintenance (*vide post*); though, *quære*, as to the more ancient cases, which seem to show that the offence and mischief of maintenance are the same, whether the suit were will or ill founded in law.

(*b*) This again, however material to the plea as one of mere maintenance, was, rather beside the real defence, which was, that the plaintiff *had* an interest in the land, in this sense, that he had an interest in maintaining the client's title to it; for assuming this alleged agreement to have been valid, he was her *creditor;* and, as a creditor, had an interest to insure his debtor's life, and so had an interest to maintain his debtor's title. Here again the question would come to this therefore, whether the original agreement for reward to depend on the event or result, was contrary to public policy: and that question of course turns on whether it is contrary to public policy that counsel in a suit should have a direct personal pecuniary interest in the event. But the plea does not allege that the plaintiff acted and made the agreement *as counsel*, or that he was counsel in the suit; although, perhaps, it would be open to raise the question under the allegation that he *unlawfully* maintained his client the defendant, or that he *illegally* agreed; the *generality* of a plea is no ground of objection after verdict, if on any fair construction of it on the facts found or admitted by the plaintiff it raises a defence.

(*c*) That is, to public policy, by reason of the agreement virtually

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Replication, that no agreement for *unlawful* maintenance

making the counsel's reward depend upon the event of the suit being in favor of his client. It matters little whether the case be regarded as it arises on the general issue, or on special plea (*ut supra*), or whether the plea be regarded as one of maintenance or champerty. If there were no precedent *agreements* for money, or no *valid* binding agreement, there could have been nothing of which to state an account, which is always (see the old forms) of debts and demands already existing, and this would arise on the general issue. If there were (as the plaintiff stated) any such agreement, then it must fall within the mischief either of maintenance or of champerty, or of something contrary to public policy, and worse than either. The maintaining by counsel, as already shown, could only here have been unlawful by reason of the previous agreement, as, *per se*, it is lawful (Bro. Abr., *Maynte-nance;* 17 Com. Dig., ibid. A.). That agreement might or might not amount to champerty, which is the worst kind of maintenance (Ibid.), and implies it, though *non è converso* (Bro. Abr., *Mayntenance*, 19; 15 Hen. 7, c. 2), and as champerty *is* maintenance, a party may raise the defence of maintenance on facts showing champerty; (Ibid. c. 3; 9 Hen. 6, c. 64). But as regards counsel, the essence of the offence of champerty would seem to be the making a reward depend upon the result of a suit. For the offence is not committed merely by conveying to counsel a portion of the estate, unless it were the estate to be recovered, and the gift were to be *after* recovery and in pursuance of a previous *bargain;* (Bro. Abr., *Champertie*, 3; 12 Hen. 4, c. 26); and, on the other hand, the offence would seem to be committed, if *money*, the produce or proceeds of the suit, is contracted to be received as a reward for service in the suit; (Ibid. 6; 15 Hen. 7, c. 2). And as the only reason for delaying payment can be that the ability to pay directly or indirectly appears to depend upon the result of the suit, it is obvious that a contract to pay counsel money *after* the result of a suit, must, if it ever could be a contract at all, contain in it the *essence* and the *mischief* of the offence of champerty, for it would make the reward depend in effect upon the result. But though there is ample authority for contracts to pay counsel, and plenty of cases of such contracts, there is not a vestige of authority for, nor a solitary instance of, any contract to pay counsel for their exertions *in and about a suit*. There are many cases of deeds granting annuities *pro consilio habendo* or *pro consilio impenso, et impendendo:* but "counsel" was a phrase, importing rather *advice* than active assistance like that of an advocate in a suit, and it was applied therefore to physicians as well as "counsellors;" (Bro. Abr., *Annuitye*, 7; 41 Edw. 3, c. 6), and clearly imported only advice, because it was always held that the client must *attend* the *counsel* to get it, and that the counsel was not bound to *attend*, and it was not necessary to show that he gave counsel if he

nance was made as alleged, nor was any account stated as

were ready to give it when required, (Ibid. 23; 9 Edw. 4, c. 48; Ibid., *Condition*, 133). And though the not giving counsel when required might forfeit the annuity, (Ibid. 61), that was by way of condition subsequent, and the *grant* was always present and absolute, and in no way dependent upon any *result*, but took immediate effect. So that, even if they had related to suits at law, they would be free from any taint of champerty, just as much so as the *payment* of fees would be. No trace can be found of *contracts* to pay fees to counsel for their exertions *in and about* a suit or suits. There are many cases in which their *retainer* in suits is alluded to (20 Hen. 6, c. 35); but it is clear that the word retainer always implied *the pre*-payment *of* the fee (Bro. Abr. *Mayntenance*, 34; 6 Edw. 4, c. 5; Ibid. c. 44; 31 Hen. 6, c. 9). It would have been clearly contrary to public policy to allow counsel to sue for their reward, because it would lead surely to champerty and something worse. The mischief and offence of champerty lay only in the encouragement of litigation, although even in a legal sense just. Indeed the offence rather implied that the litigation kept up was legally just, or else there could be no mischief to the party against whom it was kept up. And at all events it did *not* imply that the litigation was kept up by bad or unfair practices. But to have allowed counsel to bargain for reward to be paid or rendered after the result, and therefore to make their reward *depend* on the result, would have been to give them a direct *interest* in the result, and thus *tend* to induce them to act contrary to their duty to public justice. This mischief would be all the greater, because in ancient times the counsel had in effect the *whole* conduct of the suit, (since serjeants are a far more ancient order than attornies, and originally pleadings were oral), and to this day have the *chief* conduct of it, and the *sole* conduct of it *in court*; in *all* stages of it, attornies acting by their advice, and under their authority. Hence our greatest judges, in every age, have laid it down, that counsel are a *kind* of ministers of justice and right (HOLT, C. J., 6 Mod. 137); i. e. to this extent, that they are open to censure if they act wilfully against truth and justice (Ibid.). There is the well-known instance in *Saunders*, where that learned counsel was severely rebuked for artifice; and there was a similar case before Lord MANSFIELD. Thus it was on principles of public policy, far wider than the mere scope of the offence of champerty, that it was always held that counsel could not sue for their fees as such; *Chorley* v. *Boycott*, 4 T. R. 317. And this principle would apply *à multo fortiori* to any exertions of theirs *not* as counsel, in the course of, and in aid of, a suit. For the motive and interest being the same, the mischief would be all the greater, in that their agency would be more secret and latent, and beyond the sight and cognizance of the Court. Thus, for example, it might lead counsel, in their anxiety to obtain a verdict in which they had a direct

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alleged in the plea (*a*). Issue.

pecuniary interest, to resort to such means of influencing a jury—by the publication of pamphlets or the like—as might, even in the party himself, be an offence against justice and an indictable misdemeanor; *Rex* v. *Joliffe*, 4 T. R. 285; and would of course in *counsel* be an offence all the graver, on account of his peculiar duty to justice. Thus it has been laid down in our own times, by the most eminent judges, "that as it is of importance to the *public* that counsel should act with integrity and independence, *therefore* it is that they can maintain no action for their fees, in *order that their emoluments may not depend on the result of the cause*; *Morris* v. *Hunt*, 1 Chitty's Rep. 544. As already observed, this principle applies *à multo fortiori* to services by counsel in and about and *in aid* of a suit, though not strictly or properly within his province as such; and this for many reasons. He cannot properly do anything in and about and in aid of a suit save as counsel, and it does not lie in his mouth to say that he *has* done so. If he could, he would only fall more surely into the offence of maintenance or champerty; for there would (in the case supposed) be a pecuniary motive for his aid; and that, in a stranger, would amount to that offence; the *privilege* of counsel, of course, not attaching to anything *beyond* his province or duty as such. Nor could it be competent to counsel at his pleasure to denude himself of his *character* of counsel in a suit. If he could do so for one purpose he might for others; and what would become of the seal of secresy, and obligation of confidence? In anything he might assume to do in a suit, *not* as counsel, he would act with all the knowledge acquired *as* counsel; with all the *skill* of counsel; with the *motive* acting upon him in his character of counsel; in pursuance of one entire purpose and object; all with the same *intent*, and all therefore within the same *mischief*.

Although, therefore, it has been held, that counsel may sue on contracts for reward in respect of services *not* as counsel, *nor* in aid of a suit (*Egan* v. *The Guardians of the Kensington Union*, 3 Q. B. Rep. 935), it has *never* been so held of services in aid of a suit. On the contrary, the opposite principle has been recognized in the cases where it was held that counsel in a suit, in which he has acted as such, cannot be called as a *witness*; *Dunn* v. *Packwood*, 11 Jur. 242; *Stone* v. *Byron*, ibid. 44; 16 L. J., Q. B. 32. And of course there is an *additional* objection where the services are such as are *properly* within the province of an *attorney*; *Doe* d. *Bennett* v. *Hall*, 15 Q. B. 171. These principles were all recognized in the case of *Swinfen* v. *Lord Chelmsford*, 5 H. & N. 896, so closely connected with the present (*vide* Vol. I., p. 619); and it is conceived that the practical result is, that counsel can maintain no action for services in and about and in aid of a suit at law or equity. If so, this of course would be a defence on the general issue. See per L. C. J., *post*.

(*a*) The cases have come to this, that an admission of a certain sum

Kennedy, the plaintiff, appeared in person.

Macaulay and *Field* for the defendants.

Kennedy having opened the pleadings, and being about to state his case,

COCKBURN, C. J., said he presumed the learned gentleman claimed to address the jury on his own behalf, without prejudice to his right afterwards to give *evidence* (*a*). No doubt there was *authority* for such a course (*b*).

being due in respect of a *demand for which an action would lie* is evidence sufficient to support an account stated; *Porter* v. *Cooper*, 1 C., M. & R. 395; but not *further*. In *Cocking* v. *Ward*, 1 C. B. 838, the demand was one for which an action (apart from illegality) would lie. In *Lemere* v. *Elliott*, 6 H. & N. 656, it was held, that an admission of money due on what would not support an action, is not sufficient to sustain this form of action. This is quite apart from the question of illegality, whether on the ground of maintenance, champerty, or anything contrary to public policy. As to which, *vide Earle* v. *Hopwood*, 9 C. B., N. S. 566. That if the agreement for the maintenance here, was not contrary to public policy, there was no maintenance (as clearly there was reasonable cause for the client's claim), *vide Pechell* v. *Watson*, 8 M. & W. 691; *Flight* v. *Leman*, 4 Q. B. 883. That even a statutable disability of suing on the original debt, as in the case of an attorney, the non-delivery of his bill operates to preclude recovery on the account stated, see *Bockett* v *Barlow*, 9 Q. B. Rep. 847. And of course if the original claim would be contrary to public policy, if founded on an alleged express promise, as here, to pay 20,000*l*. *after* the result of the suit, that would equally be an answer to any supposed *implied* promise to pay after the result; *Jones* v. *Orchard*, 16 C. B. 614.

(*a*) It had always been held that a counsel who had acted as such, and addressed the jury, could not be sworn as a witness; *Dunn* v. *Packwood*, 11 Jur. 242; *Stones* v. *Byron*, Ibid. 44; 16 L. J., Q. B. 32. But when the act passed *enabling* parties to a suit to be examined, the above principle was abandoned. *Vide infra*.

(*b*) The 2nd section of the Act to amend the Law of Evidence, 14 & 15 Vict. c. 99, does not abridge the former *right of a party to a suit to act as his own advocate*; and a Judge at Nisi Prius has no authority to prevent a party to a suit addressing the jury as his own advocate, and *afterwards giving evidence* as a witness in support of his own case; but *such a course of proceeding is most objectionable*; *Cobbett* v. *Hudson*, 22 L. J., Q. B. 11; 1 E. & B. 11. If the matter were *res integra*, perhaps a con-

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Kennedy thereupon addressed the jury and afterwards was sworn and gave evidence, and at the close of the case replied.

The plaintiff was a barrister. The alleged account had been stated with Mrs. Swinfen before her marriage with Mr. Broun.

In 1855, Mrs. Swinfen was in possession of the Swinfen estate (where she had resided for some years) as devisee under the will of her late husband's father. A suit had been instituted against her by the heir at law to recover the estate, and an issue *devisavit vel non* had been directed by the Court of Chancery to try the validity of the decree, which the heir impeached on the ground of undue influence on her part over the testator. By the form of this issue Mrs. Swinfen was made *plaintiff*, but in reality, as she was in possession, the heir was claimant or demandant, and she was tenant. In March, 1856, the issue came on for trial, and, chiefly from dread of the evidence of two of her own witnesses, Mrs. Lishman and Mrs. Charles Swinfen, her counsel compromised her claim for an annuity.

The plaintiff was soon afterwards introduced to Mrs. Swinfen. She was still in possession of the estate, and she had always continued to be so. She told him of the compromise which her counsel had entered into, and she consulted him about it. He disapproved of it, and ultimately, by his advice, she determined to resist it. According to the plaintiff's evidence she told him that she desired that he should conduct her case, and he conferred with her attorney about it, the plaintiff stipulating that he should

trary opinion might be strongly supported. There are many cases (not cited in the above) which establish that an *affirmative* and merely *enabling* enactment does not get rid of a previous enactment, still less of a positive rule of law, least of all one founded on public policy, not inconsistent with it. There would be nothing inconsistent in the two provisions: one that parties *might* give evidence in their own behalf, the other that they might act as counsel; but that *if* they did, they could not give evidence.

have the control of the entire case both at law and in equity (*a*). He, however, conferred with her attorney, who was engaged in the suits, and who did the usual business of an attorney, and the plaintiff received briefs from him in

(*a*) There would, it is conceived, be nothing in this going beyond the province or duty of counsel; on the contrary, it is believed that in ancient times the control exercised by counsel in the course and conduct of a case was far greater than it is now; for which reason it was deemed so essential that their reward should not depend on the result, *vide ante*, p. 804.

In ancient times, as already mentioned, "deeds granting annuities to counsel *pro consilio* were very common; and although no doubt, in some cases, these deeds were to *attornies*, who were often called 'counsel' learned in the law" (see cases cited, *Chelmsford* v. *Swinfen*, 29 L. J., Ex. 388, *in notis*), yet, on the other hand, it is clear from the context of the cases and from contemporary works—such as the *Paston Letters*—that such deeds were often to serjeants or barristers, and equally clear that the "counsel" might be required by the client in or about a suit, and that the counsel *was given direct to the client, without the intervention of an attorney*. This is clear from all the cases, and the contemporary writers, from Chaucer down to the time of the Lord Keeper North; and of course it would follow that the attorney would be,—as he ought to be, as the mandatory of the client, who acted under the advice of counsel,—controlled by counsel in the course and conduct of the suit, instead of counsel being the mandatories of the attornies, as appears to have been considered by those who approved of the action of *Swinfen* v. *Lord Chelmsford*, *vide supra*, and 5 H. & N. 896. In that case, however, the original and correct doctrine was revived and broadly laid down, per POLLOCK, C. B. And in *Doe* d. *Bennett* v. *Hale*, 15 Q. B. Rep. 171, it was laid down that there was no rule of law even against a party in a *civil* suit having the assistance of counsel instructed by himself, instead of by an attorney, as is constantly the practice in criminal cases, although the Court thought it not, as a general practice, satisfactory, and no doubt it is not. But that is a very different thing from the client having the advantage of the *direct advice* of the counsel as to the *conduct* of a suit in or out of Court, the counsel not of course taking any step or doing any business usually done by attornies. It did not appear that the plaintiff in the present case *had* done so; on the contrary, the attorney did all the usual business as such. And (except, perhaps, in seeing some of the witnesses) it did not appear that the plaintiff had done anything at all out of the proper province of counsel, as illustrated by the case above referred to, and anything which he would not have been *bound* to do under a grant of an annuity *pro consilio*.

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the usual way. About September, 1856, he said he had a conversation with her respecting his remuneration, which, as he represented, was to this effect, "that she could not remunerate him now, but would amply hereafter," and that he said he must wait.

In December, 1856, the case came on in the Common Pleas, and the plaintiff conducted it for Mrs. Swinfen. He received fees in the usual way. The Court were divided, and did not enforce the compromise.

After this there were proceedings in Chancery to set aside the compromise. These also he conducted on her part with success. In April, 1856, the Court set aside the compromise, and ordered a second trial of the issue as to the validity of the devise. Pending these proceedings, the plaintiff said, he, at her request, made the acquaintance of Mr. and Mrs. C. Swinfen, the former of whom was one of the witnesses to the will, his wife being the witness, a statement by whom to the attorney having been the main reason of the compromise which had been entered into. Both of them she deemed doubtful or dangerous witnesses, and on this account desired that he should become acquainted with them. He desired to know a certain statement she was said to have made to the attorney on the subject, and was informed of it. He saw Mrs. Charles Swinfen and learned certain statements of hers as to the matter (*a*). These he deemed very unfavorable to her cause, and he represented that he had advised her to accept an offer on the part of the heir of an estate for her life. Mrs. Swinfen, however, had desired him to press Mrs. Charles Swinfen to come forward at the second trial as a witness for the will, and to urge upon her, in order to induce her to do so, that she would otherwise be involved in

(*a*) *Vide ante.* There is no authority to show that this was within the province or duty of *counsel*, while it clearly is within the province and duty of the *attorney* in a case; *vide Hatch* v. *Lewis, ante*, p. 467. And be it observed, that the *attorney* did know it, and of course would have communicated it to counsel.

a charge of conspiracy. The plaintiff declared that he had not done so; and hereupon

COCKBURN, C. J., observed:—You were asked to do what as a member of the bar you could not properly do (*a*).

The plaintiff said he had met her as an acquaintance at Mrs. Swinfen's. And so as to the other witnesses he saw.

After the now plaintiff had seen and conversed with Mrs. Charles Swinfen she was placed in confinement as a lunatic. It did not appear who was the promoter of this proceeding. The result, however, was, that an order was obtained to *read* her evidence at the trial. A similar order was also obtained as to Mrs. Lishman (whose cross-examination had on the first trial proved so dangerous) on the ground of illness. The now plaintiff said he told Mrs. Swinfen that her prospects were much improved by this. And he saw Mr. Charles Swinfen on the eve of the second trial, and also saw Dr. Rowley, and spoke with him respecting his evidence as to the state of the testator's mind.

The plaintiff stated that at this time Mrs. Swinfen was constantly talking of the suit as one in which they were both interested, and in which success would be to his advantage as well as hers. Expressions, such as "We will stand or fall together," and the like, were used (*b*). She said, in alluding to his loss of time and business, that she "would make it up to him(*c*);" and, as he himself stated, if she had failed she would not have had the means of doing so (*c*).

Before the second trial the plaintiff prepared and had

(*a*) So far as this might be relied on to sustain the second plea, the plaintiff's claim did not rest at all upon it; but it might, also, be material as bearing on the question of public policy. *Vide* per L. C. J., *post*, p. 816.

(*b*) So that, it is clear, he had a direct interest in the result, and this pervaded the whole of his services in the suit.

(*c*) The plaintiff stated that he had changed his residence, given up local business, and incurred expenses, &c., but these were accessories, or incidents, which would follow the law as to the *principal*.

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printed a report or statement of the case, which she had circulated in the county (*a*).

In June, 1858, the second trial of the issue came on at Stafford, and neither Mrs. Lishman nor Mrs. Charles Swinfen, the two perilous witnesses for the devisee, being called, she obtained a verdict (*b*).

There was an application in Chancery against it, on which the plaintiff conducted her case, and the verdict was confirmed.

In February, 1858, after the suit was thus settled, in consequence of a letter from Mrs. Swinfen's attorney (upon the occasion of the taxation of costs) about fees, the plaintiff wrote that he had undertaken the case without fees, out of friendship, but that as he knew if *he* did not *receive* fees the other side would not have to *pay* them, he would accept fees.

He accordingly received above 700*l.* for fees, such as would be allowed as between party and party.

(*a*) This was of course to influence the minds of the jurors, and doubtless it had that effect. For a party to take such a course with such an *object*, may be an indictable misdemeanor, (*Rex* v. *Joliffe*, 4 T. R. 285,) and it could hardly be a legal claim for professional reward as *counsel*, if done with that intent. And though there was no evidence that it was, yet as the counsel's reward was to depend on the result, he had an *interest* in influencing the jury, which brought this also within the rule of public policy.

(*b*) So that, as already observed, assuming that there was maintenance, i. e. an unlawful maintaining the client, the *mischief* of maintenance, so far as the opposite party was concerned, had arisen. But for the second trial, at which the two witnesses whose cross-examination might have decided the case in his favor (*vide* the report of the case, Vol. I. p. 584), he would have retained the estate. It is to be taken that the verdict was right, *on the evidence* as it appeared; but on the other hand, had it not been for the maintenance, it is possible that not only he would have retained the estate but retained it in accordance with justice and truth; and of course a verdict in his favor on the *whole* of the facts would have been *à multo fortiori*, legally just and right. This therefore made it a matter of graver consideration, whether an agreement could be legal which gave counsel a direct interest in maintaining the litigation against him.

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The plaintiff stated that several times *before* the second trial Mrs. Swinfen had spoken to him of his reward in case he should obtain the verdict, and that on one occasion she said, "It will be 20,000*l.* in your pocket," upon which he had suggested the grant of an annuity (*a*). After the verdict (he stated) she said to him, "Well, you have won your 20,000*l.*" In January, 1859, she said, "Your 20,000*l.* *are safe now*" (*b*).

In March, 1859, as he stated, occurred the conversation he relied on as evidence of the account stated, viz., he said to her, "You have several times mentioned 20,000*l.*; do you consider yourself as owing me that amount?" She answered, "Certainly, but that he could not have it at present;" on which he pressed for security, and ultimately a deed was agreed to.

In May, 1859, this deed was executed, reciting that the plaintiff had rendered her services for which she desired to remunerate him, and charging the estate with 20,000*l.* (*c*).

In November, 1861, Mrs. Broun repudiated this deed as obtained unfairly, and proceedings were pending in Chancery as to its validity (*d*).

Although, as will be seen, she was called as a witness and denied any agreement, *before* the deed, as to the *amount* of remuneration, or any mention of any particular sum prior to the deed, yet, as the jury found in favor of the plaintiff, it must be taken that the facts were as he stated them, and therefore the above statement of the effect of the evidence (so far as it appears legally relevant) has been stated according to *his own* version of the facts.

(*a*) All through, it will be seen, that the understanding was that the reward should be *after* the result of the suit, and *provided* it were in favor of the client. As to the effect of this, the vital fact in the case, *vide ante*, p. 804, *in notis*.

(*b*) *Vide supra* (*a*).

(*c*) That this deed, if valid, would not have been a merger; see *Yates* v. *Aston*, 4 Q. B. Rep. 182. That if there had not been any *previous* account stated the *deed* could not support one; see *Middleditch* v. *Ellis*, 2 Exch. 623.

(*d*) Therefore, of course, it was not *pleaded* as a defence in this action.

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Both the parties, however, agreed in this, that whatever might be the reward it was to be *after* the result of the suit (*a*).

At the close of the plaintiff's evidence,

Macaulay, for the defendant, proposed that he should not go to the jury on the plea of maintenance (*b*), but that it should be reserved for the Court upon the facts, and he submitted that there was no case for the jury, as there was no evidence of any debt of which an account could be stated (*c*).

COCKBURN, C. J.—There is evidence for the jury of an *actual* accounting. Whether the *substratum* of the account was a debt, and can be maintained, is another question, and a question of law. I shall direct the jury, that, as far as the fees for counsel are concerned, there was no sufficient consideration. I have a very strong opinion that the fees of counsel constitute only an *honorarium*, and cannot be recovered at law (*d*). There may be cases in which counsel could sue on contracts for their services (*e*), but this is not one of them. Under any circumstances (*f*) the point must be reserved; the only question for the *jury* is, whether the account was *actually* stated as alleged.

The defendant was called and denied it.

COCKBURN, C. J. (to the jury.)—This is a claim for 20,000*l.* on an *account stated*, and it is your duty to inquire whether in point of fact there was an account so stated.

(*a*) And it should seem to follow from his evidence that it was to *depend* on the result; and be only received in case the result was in *favor* of his client.

(*b*) *Vide ante*, p. 802.

(*c*) See the old form of the count, and cases thereon, cited in Finlason's *Leading Cases on Pleading* (1847), p. 1.

(*d*) *Vide ante*, p. 805, *et infra*.

(*e*) As in *Egan* v. *The Guardians of the Kensington Union*, 3 Q. B. Rep. 935, so in *Hoggins* v. *Gordon*, ibid., 466, where counsel sued for fees *as arbitrator*. No case can be cited in which counsel have sued for fees *as such*, i. e. in the course or conduct of a suit, or for service *in aid* of a suit.

(*f*) There being special pleas not withdrawn, though withdrawn from the *jury*; *vide Pawle* v. *Goding*, *ante*, p. 585. *Et vide Tallis* v. *Tallis*, 1 E. & B. 391.

There is no claim for the *services* originally rendered. The plaintiff's case is, that at the lady's request he undertook her case; that from the commencement they were both aware of the risk; that he knew she had not the means of remunerating him (*a*) unless she succeeded; that she was willing, *after* she had succeeded, to make him a liberal remuneration; that *before* the cause was finally won she stated the amount, and that *afterwards* she acknowledged the debt (*b*).

All this is denied by the defendant, who, in particular, denies that she ever promised any amount. That is for you to determine.

In this case you cannot take into consideration the services originally rendered. The claim is based on no such ground. The only claim is on the ground of an account stated. To prove that, it must be shown that the account has been admitted by the defendant.

Whether your verdict, if for the plaintiff, can be upheld, is another question—a question of law, which is reserved for the Court, but on which I have a strong opinion, *adverse* to the plaintiff.

Whatever he did *as attorney* of course falls to the ground.

Whatever he did as counsel, I am bound to tell you cannot be the ground of an action at law. And this applies to all that was done in the *character* of counsel, however much it may have been in breach of professional etiquette.

It has always been the rule of law that a barrister cannot bring an action to recover his fees (*c*). Emphatically

(*a*) *Vide ante*, p. 810.

(*b*) Which would be *evidence* of an account stated, and *only* evidence; Finlason's *Leading Cases on Pleading*, p. 1.

(*c*) This was, in substance, an opinion that, on the *general issue* the verdict, ultimately, should be for the defendant; in which case, of course, the question as to illegality would not arise. But as the question on the general issue really involved the question as to whether the original agreement was contrary to public policy, and that was a question of law for the Court upon the facts, *when* found (*Tullis* v. *Tullis*, 1 E. & B. 391), and, if the jury

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I say may it ever be so! And if we wanted an illustration of the dreadful results which would follow the removal of that rule—fencing the honorable duties of the profession against temptations to dishonor—by preventing his reward from depending on the result of the suit, it would be impossible to find a more convincing one than we have seen to-day.

Verdict for the plaintiff for 20,000*l.* (*a*).

had found for the defendant, the question of law could not have arisen; and, further, as the Judge could not *direct* a verdict on the special pleas (*ut supra*), probably the jury took the direction to mean that they were to determine whether there had been an accounting or admission of the demand *in point of fact*, the question as to whether there was any demand of which an account could be stated being reserved as one of law, *because* depending on a question of public policy, which, as the above case shows, is always for the Court.

(*a*) *Macaulay* got a rule in Easter Term, but not, of course, for misdirection on the main question.

That the control of the conduct of counsel, in the conduct of suits, is a matter of public policy (quite apart from any question, either of maintenance or champerty), seems clear, because all that relates to the *administration of justice* is so. "The institution of the Bar is principally to *assist* the Court in dispensing justice" (per ALDERSON, B., *Moscatti* v. *Lawson*, 1 Moo. & Rob. 455); and so learned Judges have always upheld, and constantly *act* upon the principle that the Bar are bound to keep themselves independent, in order the better to be able to assist in the administration of justice. Hence it is that all their powers and privileges arise. With a view to the *administration of justice*, counsel are privileged; *Flint* v. *Pike*, 4 B. & C. 480; *Hodgson* v. *Scarlett*, 1 B. & Ald. 238. Hence it is, also, they are not allowed to sue for their fees (*Morris* v. *Hunt*, 1 Chit. Rep. 564), "in order that no temptation may induce them to endeavour to get a verdict which, in their consciences, they think they are not entitled to." "It is for the purpose of promoting the honour and integrity of the Bar, that it is expected that their fees should be paid, and that their compensation shall be equally the same whether the event be successful or unsuccessful." "There is nothing which has so great a *tendency to secure the due administration of justice*, &c." This, being the principle, was upheld in *Swinfen* v. *Lord Chelmsford* (cited *supra*), and is the principle on which the Lord Chief Justice *might* have directed a verdict for the defendant in the present case on the *general* issue, had that stood *alone*. That he could not do so, there being special pleas on which the plaintiff had a right to insist on a verdict, *vide Brett* v. *Philips*, Vol. I. p. 398; *Paule* v. *Goding*, *ante*, p. 585.

HOME CIRCUIT.

Hertford, coram Erle, C. J.

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EDWARDS *v.* BOND.

Spring Assizes.

The tenant of a farm having sold plaintiff his crops and tillages, and agreed to let him have possession of the farm to cultivate them, and having previously let the defendant into possession of a mill and some fields, and into occupation of part of the mill-house, the rest being occupied by the farm bailiff:—*Held*, (there being no proof of *title* in either,) that it was for the jury what the parties respectively had been *put in possession of*, and that the plaintiff might, in trespass to the house, recover as to *part* of the house.

FIRST count, for entering certain closes of the plaintiff, called "Gravel Pit Field," "Grass Land," and "Eight-acre Field," and expelling him therefrom.

Second count, for entering dwelling-house of the plaintiff, called "Stafford Farm," and expelling him therefrom.

Third count. That one Smith, being tenant of the farm called "Stafford," had sold to the plaintiff certain tillages, at a valuation thereon, and agreed to let him the farm to work them off, subject to his existing tenancy and to all the terms thereof (including rent and outgoings), &c. That the defendant claimed to be entitled to the possession of the farm-house, and that there was then a *bonâ fide* dispute about it, and the defendant was *not* entitled to the possession of the said house and *land;* and thereupon, in consideration that the plaintiff would permit the defendant to retain possession of the said *land* for the term of the plaintiff's interest thereon, the defendant promised to pay to the plaintiff his, the defendant's, share of the valuation, and rent and outgoings of the said land, and to *give up to the plaintiff quiet possession of the said farm-house.* Averment, of all conditions precedent. Breach, that the defendant had not given up possession of the *farm-house.*

Pleas (to the first and second counts respectively): not guilty and not possessed.

4. Leave and licence.

5. To the third count, denial of the promise.

6. That the plaintiff did not permit the defendant to

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have possession of the land, but molested him in it continually from the time of the supposed promise.

7. That before breach the plaintiff exonerated the defendant from performance of the agreement.

Shee, Serjt., and *Woollett* for the plaintiff.

Hawkins and *Raymond* for the defendant.

One Smith had been the tenant of Stafford Farm, on which there was a mill, with a house adjoining it, in which his bailiff had lived. He himself had not been in occupation, and had allowed the defendant, who had acted as a sort of steward, to use the mill and three fields of *grass* adjoining it, and also to occupy a few rooms in the house, the *bailiff* still residing there.

On the 16th December, 1861, Smith agreed to let the *defendant* the fields in question, mentioned in the first count, for the remainder of his own term, and being indebted to the defendant, gave him a receipt for rent of the "*mill and premises he now occupies*," up to Lady-day next.

On the 18th December, 1861, Smith entered into the agreement with the *plaintiff*, mentioned in the *second* count, i. e. to sell him the crops and tillages at a valuation (*a*), agreeing orally to let him have possession of the farm for the purpose of cultivating and reaping the crops.

The valuation was made in the usual way, the plaintiff going over the farm with Smith and the valuers, and claiming the fields in question, which defendant also claimed, and refused to give up. The plaintiff paid the valuation. Plaintiff said, that Smith said "I give you possession of the farm."

Disputes arose between the parties, and on the 28th

(*a*) That this gave the plaintiff an exclusive right to the possession of the farm, at all events the *arable* portion of it, see *Crosby* v. *Wadsworth*, 6 East, 602; on the other hand, it gave no *estate*, but only an interest, by way of licence in law.

September, 1861, the following memorandum was signed by the parties.

"*In re Stafford Farm.* Mr. Bond wishing to have the grass-land adjoining the water and also the field of eight acres [one of those mentioned in the declaration], Mr. Edwards will not molest him in the same; *Mr. Bond giving quiet possession of the farm*" [and house]. The latter words had, it was contended, been added by the plaintiff (and the jury found *against* him as to that), and the defendant retained the fields and also the house. The plaintiff had exercised various acts of ownership on the farm, and *attempted* to do so in the fields in question, but had been resisted, and he had not entered the house, but the bailiff appeared to have acknowledged him.

In January, the plaintiff brought ejectment for the house and lands in question, but soon afterwards discontinued that action (*a*) and brought the present one, suing, it will be seen, in trespass, and also on the agreement.

It did not appear what was the duration of Smith's tenancy, but it was taken that it was subsisting.

The case for the defendant was, that he was lessee of mill, house and fields adjoining thereto.

The case for the plaintiff was, that he had been put in possession of the entire farm, and that if the defendant had

(*a*) Doubtless, because there was no legal estate or title in the plaintiff nor any actual possession, except as to the land *not* in dispute, and a doubtful and constructive possession of the fields and the house in dispute, and such possession, though it might sustain trespass, would not suffice for ejectment. The remedy even of a *lessee* who cannot get possession is by an action against his lessor on the agreement, *Coe* v. *Clay*, 5 Bing. 440; on the same principle, until entry, the lessee does not become tenant, so as to enable the landlord to sue for use and occupation (*Pinero* v. *Judson*, 6 Bing. 206), unless there has been an actual *lease*. On the same principle, a landlord, defending in ejectment, can only recover such premises as the tenant is in *possession* of (*Fenn* v. *Wood*, 1 B. & P. 573). And a licensee, in fact or in law, as a receiver, cannot maintain ejectment; 3 Bro. C. C. 83.

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any prior subsisting right he had parted with it by the agreement, but that he had no prior right, and that it was only by the agreement he had acquired a right to the eight acre field, which the plaintiff thereby consented to give up to him.

Smith was called for the plaintiff, and confirmed his case; and stated that the plaintiff wanted, and he agreed that he should have, the whole farm, but that the defendant was in possession of the *mill;* and as to the house, all he could say was, that he had let him occupy a few rooms there, for which it did not appear that any rent had been paid previous to the receipt referred to.

ERLE, C. J. (to the jury).—Did Smith let to the defendant the *whole* of the house and the fields in question. The case for the defendant is, that he *did.* If so, did the defendant agree to *give up* any or what part of the premises in dispute?

The case for the plaintiff is, that he was put in possession of the whole farm except the mill. The miller or bailiff was in occupation of part. Was he the *plaintiff's* agent or bailiff? If the defendant was entitled to and in possession of part of the house, then he would be entitled to a verdict as to part (*a*).

The jury found for the defendant as to the *agreement,*

(*a*) It was held, before the Common Law Procedure Act, 1852, that, in trespass for entering a house and taking goods therein, the verdict might be distributive, for the plaintiff as to the house and the defendant as to the goods; *Routledge* v. *Abbott,* 8 A. & E. 592. And the goods in a house were not more distinct from the house than one room in a house is from another. Accordingly the same principle was applied in the latter case. Proof that the plaintiff was in possession of two rooms of a house, has been held sufficient to satisfy an allegation in a *count,* that the plaintiff was in possession of the "messuage," upon which issue had been taken; *Fenn* v. *Grafton,* 2 B. N. C. 617. And though proof that the defendant was merely a lodger in two rooms was afterwards held not to support a *plea* that he was possessed of the *house; Monks* v. *Dykes,* 4 M. & W. 567.

and as to the house, that Smith had only let him *part* of it and the plaintiff the rest. Thereupon,

ERLE, C. J., directed this to be entered as a

Verdict for the plaintiff on the first count (*a*).

(*a*) With leave to move; on which a rule was obtained in the Exchequer, on the ground that the evidence did not support the finding, that only part of the mill had been let to the defendant, and that the plaintiff was entitled to possession of the other part, not on the ground that the plaintiff had no possession to maintain trespass; and *semble*, that it might have been deemed that he *had*, either as having possession of the bulk of the farm, to which the mill-house was incident, or as having possession of it by his bailiff. If he were legally entitled to part of the house *along* with the rest of the farm (as he was according to the finding), then, having entered on the *principal*, the farm, and being in possession of it, he might maintain trespass against a wrong-doer, as the defendant then would be; *Butcher* v. *Butcher*, 7 B. & C. 399.

HILTON *v.* GREEN AND OTHERS.

Lent Assizes.

A person having an agreement for shooting over a farm has only a right to do so in the usual and reasonable way, and not to tread over fields of standing crops at a time when it is *not* usual or reasonable, and whether the occupier standing by is evidence of actual leave and licence, depends on all the circumstances. He has no right to turn rabbits on to the farm, without express leave to do so, and he is liable to the occupier for damage done to the crops by rabbits, or the *progeny* of rabbits, thus turned on by his express or implied authority, and *without* the occupier's licence.

FIRST count, for that the defendants entered a farm and lands of the plaintiff and trampled down his crops, and also turned and put on a large number of rabbits loose and at large in and about the plaintiff's farm and lands, and whereby the plaintiff's crops were eaten up and damaged.

Second count, for that the plaintiff was possessed of a farm and lands, on which he had sowed divers crops, and the defendants wrongfully and maliciously turned and put on to the said farm and lands a large number of rabbits, and *caused large numbers thereof to enter the said farm and lands*, whereby the said farm and lands became greatly overrun and the crops greatly damaged and injured.

Pleas: 1. Not guilty.

2. Leave and licence.

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3. That the farm and lands were not the plaintiff's.

4. That on the 1st March, 1851, by indenture made by and between J. N. C. and J. C. of the one part, and the plaintiff of the other part, they demised to him for a year the said farm and lands, reserving to them (*a*), their friends and servants and any person with their leave, the right to hunt, shoot (*b*), fowl and take game (*b*) in and upon the said farm and lands, whether for recreation or for any other reasonable purpose, during the continuance of the demise, doing no wilful or unnecessary damage to the plaintiff's corn, grass or hay, woods or fences.

Averment, that, before and at the making of the said grant, there was a reasonable number of rabbits on the lands and farm, and that they committed the acts complained of (*c*) during the demise and with the express leave of the landlord, and in the reasonable enjoyment thereof and for the reasonable purposes of the grant; and did not put more rabbits on the said farm and lands than were necessary to keep up a reasonable amount of rabbits on the said farm and lands, and to prevent the rabbits from being unreasonably diminished and destroyed, and did no wilful or unnecessary damage to the plaintiff's corn, hay, &c.

Replication (with demurrer), that the acts complained of (*c*) were done to an unnecessary extent and *not* in the reasonable enjoyment or for the purposes of the grant, &c. And new assignment of excess. Issue.

Shee, Serjt., *Woollett* and *Murphy* for the plaintiff.

Hawkins, *Bushby* and *Bevan* for the defendants.

(*a*) See *Wickham* v. *Hawker*, 7 M. & W. 63, that this *is* matter of *reservation*, not *exception*.

(*b*) If this were construed as a licence to shoot (anything), and also a licence to take game, the former would, of course, include rabbits; but if the words "to shoot," only are to be referred to *game*, it would be otherwise.

(*c*) That is, especially, as to the *putting on* of the rabbits; for there was no complaint as to *shooting* them. And *semble*, the deed contained no licence to put on rabbits; *vide per* ERLE, C. J., *post*.

In March, 1851, the plaintiff became tenant of the farm under the demise by indenture, which being only for a year, he became tenant from year to year on the terms of that demise.

In 1854, he took the *underwood* of a wood called Buckney Wood, adjoining his farm, and separated from it merely by ordinary hedges and fences.

In March, 1855, the landlords by memorandum in writing, *not* under seal (*a*), agreed to let to the plaintiff the right of shooting on the farm *and wood* for that year, on receiving from him 25*l.*, and he agreed to *take* the shooting (*b*) on those terms. At the same time the plaintiff entered into a written agreement (*a*) with one of the defendants (Edward Green), that the latter should have the shooting (*b*) for a year, until Lady-day, 1856, employing the plaintiff to look after it for him, and agreeing to pay him for game and rabbits *killed* at a certain rate specified, in a sort of schedule set forth, in which the rate to be paid for the first hundred of rabbits was 6*d.* a head, for the *second* hundred 9*d.* a head; pheasants, &c. being provided for in a similar way, as that the total *estimated* amount as specified came to about 40*l.* (*c*).

At the expiration of the year, under *this* agreement, the defendant Green complained that he had not enough game or rabbits, and did not renew it, but agreed to pay the plaintiff 25*l.* per annum for the shooting on the farm and wood, and engaged one Vigis as gamekeeper. Shortly afterwards the defendant Green was joined in the shooting

(*a*) See *Bird* v. *Higginson*, 2 A. & E. 696, that, strictly speaking, these agreements would convey no interest, though they would enable the parties, after *enjoyment*, to recover the compensation; and the legal effect of it would only be a *licence to shoot*.

(*b*) Which would include the rabbits, not being limited to game.

(*c*) This was admitted in evidence by ERLE, C. J., on the ground that it did not appear on the face of the agreement that rabbits or game to any particular amount would be killed; so that it did not appear to be of the value which required a stamp.

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by his son, and also by one Collyer, the *landlord's* son (the other defendants), and the three formed a shooting fund, out of which thenceforth all expenses were paid.

There was a deposition by Vigis, taken when in his last illness, to the effect, that by the directions of Green and Collyer he had, in the first year of his service, i. e. before March, 1857, obtained and turned on to the farm or wood some hundreds of rabbits, and that the former paid him money for the purpose. The other two defendants did not join in the shooting fund until about the *latter* time; but there was slight evidence that, prior to then, they had occasionally joined in the shooting, and that they had actually on one or two occasions been present when rabbits had been obtained or turned on, or directed to be obtained. The deposition of Vigis was confirmed by the evidence of his widow and son, who spoke to sums received by Vigis for the procuring of rabbits. And other witnesses spoke to *a great increase of rabbits after Vigis came.* It appeared that most of the rabbits were put into Buckney Wood, which being of a wet, clayey soil, they would not burrow there, and burrowed in the hedges all around it, and that the damage to the farm was chiefly in the vicinity of the wood. There was also evidence that, in 1857 and 1858, the plaintiff complained of the damage they did, and that it was intimated to him that if he could not agree with the defendants he must quit. The result was that in Michaelmas, 1858, he received notice to quit at Michaelmas, 1859, and did so; previously to which, in April, 1859, he made a claim for compensation to the amount of above 600*l.* for damage done by the rabbits in 1856, 1857 and 1858; and also a claim of 12*l.* for damage done by the defendants to a field of clover while beating there for game in September, the value of the crop being stated at 30*l.*, and the sum realized for it only 18*l.* The plaintiff, however, was *present* at the time of the occurrence, and did not object. The present action was not brought until

February, 1861, the alleged reason for the delay being, that the plaintiff had not until then obtained the evidence of Vigis, and so was not in a position to prove that rabbits had been *turned on* to the farm.

The case for the defendants consisted in an entire denial of any authority to Vigis to turn rabbits on to the farm, and of any knowledge that they had been so turned on. And as to the clover field, they alleged that they had done no more than the ordinary and necessary damage.

The case had been tried here at the last Summer Assizes, before WILLIAMS, J., who told the jury, as to the alleged trespass in the clover field, that the defendants had no right to do damage to the standing crops; and as to the turning on the rabbits, his Lordship left to them two questions—1. Whether *any* were turned on with the express or implied directions of the defendants (if not, he said, they were entitled to the verdict); and, 2ndly. Whether rabbits were so turned on to an unreasonable extent, looking to the terms of the grant or reservation. The learned Judge added, that there was no evidence of leave and licence. The jury were discharged, being unable to agree.

On the present occasion,

ERLE, C. J. (to the jury).—As to the alleged trespass to the clover field, there is not any dispute as to the *facts*, except as to the amount of *damage;* and the question turns on the conflicting rights of the sportsman to his game, and of the farmer to his crops, a question which you must determine by the light of your practical experience, as it is hardly capable of legal definition, except thus far, that the defendants had no right to do *unnecessary* damage; that is, they were only justified in the exercise of their privilege, in the *usual* manner, and with the care *usually* taken by sportsmen in regard to standing crops; and it is for you to say whether, if you are satisfied that the amount of damage was as stated, such an exercise of the

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right *could* be usual, reasonable, or necessary, or such as the farmer could have contemplated when giving the right to shoot. If not, then the determination of value will be a good definite measure of damage.

As regards the alleged leave and licence, no doubt the plaintiff, being present and silent, standing by and not objecting, would be *evidence* of such licence; but on the other hand, you must consider whether a person in his position, a tenant from year to year, might not have been deterred from objecting by a dread of offending his landlord, the sportsmen being his landlord's friends, and one of them his landlord's son.

Then as to the rabbits, observe, that the defendants can only be liable for rabbits *turned on*, or for the growth and progress of rabbits turned on, and not for the mere natural increase of rabbits already on the farm; for it is no ground of action that rabbits are not *destroyed*. The ground of action is the *turning on* rabbits; and the defendants can only be liable for rabbits turned on with their express or implied authority, or with their sanction and approbation, or for the increase of rabbits so turned on. And the defendants can only be *jointly* liable for rabbits turned on with the sanction of *all* of them; and you cannot, in this action, find against them for damage done by some rabbits turned on by orders of one of them, and by other rabbits turned on by orders of another of them (*a*).

Then again, you can only in this action find against the defendants for damage done by rabbits turned on to the *farm*, not as to rabbits turned into Buckney Wood, which was no part of the plaintiff's holding (*b*). For if rabbits

(*a*) Of course the Lord Chief Justice did not mean that the jury might not find a verdict against one of them—as, the senior Green, —for damage done by rabbits *he* had ordered to be turned on, *acquitting the others altogether.*

(*b*) From which it is to be inferred that the learned Lord Chief Justice was of opinion that there was no evidence of an *exclusive* possession of the surface of the wood, by reason of the plaintiff's right to the underwood, otherwise trespass would lie for putting in rabbits; *vide ante*, p. 818 (*a*).

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were put into the wood, and thence strayed into the farm, the defendants would not be liable for the injury they caused (*a*). But as regards rabbits turned on to the *farm* by the direction of the defendants, they would be liable, because the leave to *shoot* on the farm implied no right to put rabbits into the farm. That hundreds of rabbits *were* turned on to the farm there can be no doubt. The question is, whether they were so turned on with the sanction and authority of the defendants.

After a long deliberation, the jury were unable to agree, and eventually

Jury discharged (*b*).

(*a*) The plaintiff's case not having been put or shaped in that way at the *trial*; although as to the second count, *vide ante*, p. 821.

(*b*) The Court of Exchequer changed the venue to Middlesex.

Chelmsford, coram Erle, C. J.

THE QUEEN *v.* EAGLE.

Spring Assizes.

The prisoner having, after a trifling and casual altercation, sustained several blows from the deceased, (a stranger to him,) instantly stabbed him with a clasp knife he had about him:—*Held*, that it was for the jury, whether or not the blow was struck in the heat of sudden passion, without previous malice, so as to reduce the offence to manslaughter.

MURDER. The prisoner, a tall and very powerful man, had met the deceased, an old umbrella seller (to whom he did not appear to have been known), idling about a public house. The prisoner took hold of one of his umbrellas and asked what it would be, and the deceased said a shilling. The prisoner said he would give fourpence for it; and thereupon some idle talk took place, which was not given very fully by the witnesses, but in which some of the expressions seemed to show that the deceased was annoyed at the trifling value set on the umbrella, and the prisoner annoyed at some remarks of the deceased. It appeared that they twitted or taunted each other as to their having been soldiers, the deceased saying that he had been in the army, and the prisoner saying, in answer, that he also had been so. The deceased was going away, when he tripped; and though the witnesses

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did not see the prisoner put out his foot to trip him up, it appeared that he had done so, for that the deceased angrily said that if he did that again he would knock him down, or something to that effect. The deceased then was again going away, when he again tripped, and, as would appear, from the same cause (*a*). Thereupon the deceased turned round, and struck the prisoner as hard as he could upon the head with an old umbrella, the handle of which (not very strong) was broken with the blows. The prisoner said nothing while the blows were being given, nor was he *seen* to draw anything, nor was it seen whether he had a knife in his hand before; if not, he must then, or the instant afterwards, have drawn it out of his pocket and unclasped it, for immediately after he was seen to strike out at the deceased, and the latter staggered away, and was found to have sustained a wound in his stomach, inflicted with such force, that the weapon went right through to the spine, severing an artery, and so causing death in a short time. The prisoner was found to have an open clasp knife in his hands, and a minute after said (showing it), "I have given him this."

Woollett, for the prisoner, urged that it was a case of *manslaughter*.

ERLE, C. J. (to the jury).—The essence of the crime of murder is malice prepense (*b*), and the law implies malice

(*a*) This repeated aggression on the part of the prisoner was not pressed at all on the part of the prosecution, and did not appear to be taken much notice of.

(*b*) But it was left to the jury whether there was *not* malice prepense, and they were not told that, merely because of the blows, there was *not* such malice. Shortly before these assizes there had been some dissatisfaction in the public mind in consequence of certain persons, charged with homicide, arising out of a sudden affray, having been acquitted of murder, and convicted only of manslaughter. It seemed to be supposed that the law had been laid down as if homicide, arising out of a sudden quarrel or affray, could not be murder; and there is not wanting some sort of colour for that notion, even in learned works; as, for instance, Reeves'

where one has killed another by the use of a deadly weapon, unless the circumstances rebut the inference, and

Hist. Eng. Law, vol. 2, p. 537, where the learned author speaks of the act of killing, on a sudden quarrel, as one which could not, consistent with the feelings of the mind, as well as the dictates of plain sense, be stigmatized with the name of murder. Such a doctrine has never, however, been laid down by any Judge, and it would be dangerous if it ever were received. Beyond all doubt it has always been recognized that deadly malice may arise, out of a sudden provocation, given to a person of malign and murderous disposition, and be shown in the use of a *deadly weapon*, and that *mere* suddenness, though *necessary* to *disprove* malice prepense, does not *per se prove* it. "When one kills another voluntarily, without any provocation," [i. e. as the context shows, without any *legally sufficient*,] "it is murder, for the law presumes it to be malicious; it remains, therefore, to be inquired what is such a provocation as will take off the presumption of malice in him that kills another" (1 Hale, P. C. 454). And then Lord Hale gives instances, all of *sudden* quarrels, but in which it has been laid down, as matter of law, that mere words of slight or insult *are not* sufficient provocation to reduce it to manslaughter; but that any actual assault, or even menace of an instant assault (such as might sustain an action of assault), *might* be sufficient; and *à fortiori*, blows or beating. He also lays it down, that if, upon bare words of taunt, the party *taunted* strikes, and *then* the taunter gives the fatal blow, the proverb, that "it is the *second* blow which makes the affray," may apply, and the act may be only manslaughter. The same reason would apply, if, as in this case, the deceased were not only taunted, but actually tripped or lightly assaulted before he struck a blow, unless, indeed, there be evidence to show that the taunting or the tripping up, or the like, were "deliberate artifice, thereby to take occasion to kill the other" (Ibid. p. 456). Of this there was some reason for *suspicion* in the present case, but no sufficient evidence of the intention. The case which caused discontent was one at the Central Criminal Court, coram POLLOCK, C. B., and MARTIN, B., in which it was laid down, a sudden blow with a knife, by a drunken man, *might* be manslaughter; in entire accordance with previous cases establishing that, "although voluntary drunkenness cannot excuse from the commission of crime, yet when, as upon a charge of murder, the material question is, whether an act was premeditated or done only with sudden heat and impulse, the fact of the party being intoxicated has been held to be a circumstance proper to be taken into consideration;" HOLROYD, J., *Rex* v. *Grindley*, 1 Russ. C. & M. 8; PARKE, B., *Rex* v. *Thomas*, 7 C. & P. 817. The *law* certainly is, and is laid down as matter of law, that the killing of a person in an affray by another who is in a *violent heat and passion* at the time,

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reduce the offence to manslaughter. The circumstances of the case *do* rebut the inference of malice, if they show and without any previous malice, is not murder, but manslaughter (*Rex* v. *Rankin*, R. & R. C. C. 43); and that if, on a sudden quarrel, blows pass without any *intention to kill or injure any one materially*, and in the course of the scuffle, after the parties are heated by the contest, one kill the other with a deadly weapon, it is only manslaughter; *Rex* v. *Snow*, 1 Leach, C. C. 151; 1 East, 244. But then it is equally the law, that it is *not every slight provocation*, even by a blow, which will, when the party receiving it strikes with a deadly weapon and death ensues, reduce the crime from murder to manslaughter; *Rex* v. *Lynch*, 5 C. & P. 324. And it is also the law, that it is a question for the jury, under the circumstances, whether it is murder or manslaughter (*R.* v. *Wiggs*, 1 Leach, C. C. 379); i. e. whether the provocation was really such as *did* cause a violent heat and passion in the mind of him who struck the stroke, and whether the blow was struck under the *influence* of such heat and passion, and without any deadly malice; i. e. without any intention to kill or injure grievously. And this must depend upon the most minute circumstances, which can only be matter of fact for the jury. Thus, though it has been laid down as matter of law, on matter of fact clearly proved, that *if*, after blows struck, one of the parties, *on a sudden* and *without any such intention at the commencement of the affray*, snatches up a deadly weapon and kills the other party with it, such killing will only amount to manslaughter; *Rex* v. *Anderson*, 1 Russ. C. & M. 447. But that very direction implied that it was a question of *fact*, as, of course, it must be, whether there was or was not such intention. And so it was laid down as law, on the other hand, if a party, under colour of fighting upon equal terms, uses *from the beginning* of the contest a deadly weapon without the knowledge of the other party, whom he kills with such weapon; or *if at the beginning of the contest he prepare a deadly weapon*, so as to have the *power* of using it in some part of the contest, and accordingly does so and kills the other party; the killing in both these cases will be murder; *Rex* v. *Whiteley*, Lew. C. C. 173. Here, again, it is equally implied, that it is matter of fact whether the weapon *was* so prepared from, or at, the commencement of the affray; and also implied that the *deliberate* preparation of it at *any* time, even in the course of the affray, with the design of using it in a deadly way, would make the crime murder. And so, in the present case, if the prisoner had drawn the knife *before* the blows were struck, and while he was taunting or tripping up the deceased, there would have been clear and conclusive evidence of murder; but still it would have been only evidence, and the matter would have been for the jury. It very rarely happens (if ever), in cases of this class, that the Judge

that the blow was given in the heat of passion, arising on a sudden provocation, and before the passion had time to

can lay it down, as matter of law, that the act is murder. What evidence there *was*, however, was left to the jury, in the general direction, to consider whether there was malice prepense. And though the language of Lord HALE would appear to imply, in the passage referred to, that it was always a question of law, the modern cases clearly show that it is matter of fact for the jury where there is a sudden affray, and the effect of the evidence is doubtful. In the cases he cites the facts are stated as clear, and absence or presence of an *intent* is stated. But where, as in most cases of this kind, *that* is the very point in doubt, it must be matter of fact. The *law* has been well settled, and has always been laid down as above by the Lord Chief Justice. An assault, though illegal, will not reduce the crime of the party killing the person assaulting him to manslaughter, *when the revenge is disproportionate and barbarous;* and that it is so may be matter of law, when it is clear it was revenge; *Rex* v. *Willoughby*, 1 Russ. C. & M. 437; 1 East, P. C. 288. So even *blows previously received* will not extenuate homicide upon *deliberate malice and revenge;* especially where it *is to be collected from the circumstances* that the provocation *was sought* for the purpose of *colouring* the revenge; *Rex* v. *Mason*, 1 East, P. C. 239. But whether it was so or not must be matter of fact for the jury, whether they find a special or general verdict. In the case of killing by shooting or stabbing, all that is necessarily matter of law is, that, *primâ facie*, the act implies an intention to kill, and so is murder. But, even in a case of death by stabbing, it has been laid down, that "if *the jury* are of opinion that the wound was inflicted by the prisoner while smarting under a provocation, so recent and so strong that the prisoner may be considered as not being at the moment the master of his own understanding, the offence will be manslaughter; but if there had been after the provocation sufficient time for the blood to cool, for reason to resume its seat before the mortal wound was given, the offence will amount to murder; and if the prisoner display thought, contrivance and design in the mode of possessing himself of the weapon, and in again replacing it immediately after the blow was struck, such exercise of contrivance and design denotes rather the presence of judgment and reason than of violent and ungovernable passion;" TINDAL, C. J., *Rex* v. *Hayward*, 6 C. & P. 157. But all these are *facts* to be found by the Jury, or proved beyond any doubt or dispute, to enable the Judge so to lay down the law. It is always, in all cases, civil or criminal, matter of law whether there is *any* evidence of a legal ground of defence; and as it may be matter of law that a blow is not sufficient to *excuse* homicide (and was so laid down in this very case *vide supra*), so it may be matter of law, that a blow is not sufficient to reduce the

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cool. This you are to judge of. In the present case the quarrel was sudden; the knife was a clasp knife, such as might be naturally carried about the person, and was not fetched for the purpose; and the deceased struck the first blow, and struck repeated blows. Those blows were not severe enough to *excuse* the use of a deadly weapon (especially as the prisoner was so much the more powerful man, and had not used his natural weapons); but if they excited a passion, in the heat of which the prisoner gave the fatal blow, then you may find him guilty of manslaughter, a crime which greatly varies in intensity, and may come very nearly up to murder.

Verdict, guilty of manslaughter. Sentence, ten years' penal servitude.

defence to manslaughter; or it may be matter of law that it *may* be so, *supposing* the jury find, as a matter of fact, that it did produce a passion, which, as a matter of law, it was legally sufficient to provoke. And so it has been laid down, that if A. kill B. under provocation of a blow not sufficiently violent in itself to render the killing manslaughter, but the blow be accompanied by very aggravating words and gestures, that will be but manslaughter in A.; per POLLOCK, C. B., *Reg.* v. *Sherwood*, 1 Car. & K. 556. But it could hardly be laid down, as matter of law, that three violent blows were not enough to put a man in a passion, and reduce the crime to manslaughter. But, on the other hand, that it *might* be murder, and that whether it is so or not, is matter of fact for the jury, is implied in the Judge leaving the question to the jury, otherwise it would be his duty to *withdraw* it from them, and tell them, as matter of law, either it is *not* murder, or *it is* murder. It would have been clearly murder if there had been clear evidence that, after taunts had passed, the prisoner drew his knife, and, in order to provoke the deceased to strike him, tripped him twice, with *intent* then to use his knife. But then all the facts, and *especially the last*, would have to be found by the jury, for although, *denuded of* all circumstances, the bare fact of using a knife implies, in law, an intent to kill, *when the* circumstances are shown, and the affray turns out to be sudden, and the act after blows given, it must be a question of *actual* intent, and *that* is always and *necessarily* matter of *fact* for the jury. Therefore it was left to them by the Lord Chief Justice, and (as will be seen) in exact accordance with all the authorities.

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REGINA *v.* CHEVERTON.

Lent Assizes.

THE prisoner was indicted for the murder of her infant (illegitimate) child, on the 4th of July last, by drowning it in the Colne, at Colchester.

Walford for the prosecution.

Philbrick for the defence.

One Baxter, a policeman, had said to the prisoner, "You had better tell all about it; it will save trouble;" and had then put certain questions to her, in answer to which she had made a statement, which it was proposed to prove on the part of the prosecution.

Philbrick objected that it was inadmissible, as having been made under the influence of a kind of threat or inducement by a person in a position of power and authority; and

ERLE, C. J., so held, and the evidence, therefore, was excluded.

A police superintendent, named Down, had afterwards, about the same time, December, gone to the prisoner, and without cautioning her, or explaining the object of his inquiries, put certain questions to her, and it was proposed to give her answers in evidence. It did not appear that *he* had referred to her statements to the other officer, Baxter, but *she* had said, when she saw him, "Ah! I expected you." And his questions were as to the number of her children, and especially what had become of the

Although it is necessary, in a case of murder, that there should be evidence that the body found is the body of the murdered person, the circumstances may be sufficient evidence of identity.

Admissions by the prisoner, elicited by questions of a police officer, with an admonition to tell all she knew, &c., *held* inadmissible. But a subsequent statement by the prisoner to another police officer is not *necessarily* so far under the same influence as to exclude it (*a*).

(*a*) If a confession has been obtained from a prisoner by undue means, any statement afterwards made by him *under the influence of* that confession cannot be received. *Rex* v. *White*, 1 Phil. Evid. 104. But whether the second statement has been so made under the influence of the consciousness of the former confession, is a collateral question of fact, probably, for the Judge to determine, and it would seem that it was so determined here, *vide post.*

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youngest (the one mentioned in the indictment), and in particular whether she had been at Colchester on July 4th (*a*).

Philbrick objected that the statements were inadmissible, because made by the prisoner under the influence of the same inducement, it being all part of the same proceeding on the part of the police (*b*).

ERLE, C. J., consulted WIGHTMAN, J., and intimated that his learned Brother and himself were of opinion, that though the former statement was inadmissible, there did not appear the same reason for excluding the second. He would, however, reserve the point if requisite.

The prisoner's statement was to the effect that the father of the child (which was illegitimate) had written for it, and that she had sent it to him, at Ipswich, by a woman, at the railway station, Colchester.

The only other evidence was, that she had been seen on the 4th of July going in a direction which *might* be towards the river or towards the station, with something which, to the witnesses, *seemed* like a child, of about the age of the missing infant (sixteen months), and that, on the next morning, a body of an infant child, of the same sex, and (so far as appeared) about the same age, was found dead

(*a*) The Lord Chief Justice, in charging the grand jury, had observed upon this proceeding as very improper. COCKBURN, C. J., during the same assizes on the Midland Circuit, expressed a similar censure in a similar case.

(*b*) *Philbrick*, probably in taking the objection, was, from its peculiar nature, reluctant to disclose its full weight, viz., that the prisoner's second statement was no doubt induced by the reflection that it would be useless to deny to the one officer what she had already confessed to the other. In this view of course the *second* statement would be in the same position as the first. It should seem, however, that the Judges decided, as a collateral question of fact on the evidence, that the second statement was not made under the influence of the consciousness of the former. It should seem to be a question of fact rather than of law.

in the river. It appeared that this child had died from drowning, but there was no other evidence, otherwise than before mentioned, to identify it with the prisoner's child, and

Philbrick, for the prisoner, relied chiefly on that ground of defence, citing Lord Hale (*a*).

ERLE, C. J. (to the jury).—It is no doubt essential that you should be satisfied that the body found in the Colne was the body of the prisoner's child, and put there by her. It is most important, as laid down by Lord Hale, that on an indictment for murder it should be shown that the body found is the body of the murdered person (*b*), as otherwise persons might be convicted for the murder of a person who was alive. It has been suggested, on behalf of the prisoner, that the child supposed to be murdered was sent away by her, and is, or may be, alive. That is not for her to prove, but for the prosecution to disprove. To disprove it, her answers to the questions of the police superintendent on the second occasion are relied upon. To put such questions without any caution was most improper, especially since the prisoner does not seem to have been aware of their drift or object. And an unmarried woman might naturally be reluctant to answer fully as to her illegitimate children. On the whole evidence, are you satisfied that the body found in the river was the body of the prisoner's child, and that it was put there by her?

Verdict, not guilty.

(*a*) "I would never convict any person of murder unless the fact (i. e. of the *killing*) were proved to be done (i. e. clearly by eye-witnesses), *or* at least the body found dead." 2 Pl. C. 290. But here the question was only one of *identity*.

(*b*) *Vide supra*.

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REGINA *v.* LAW.

Lent Assizes.

A married woman, having killed her husband immediately after an apparent recovery from a disease (the result of childbirth) which caused a great loss of blood and exhausted the vessels of the brain, and thus so weakened its power and so tended to produce insane delusions of the senses, which, while suffering under such disease, she complained of, and which, by her own account, had been renewed at the time of the act of homicide (although they were not such as would lead to it):—*Held*, evidence from which a jury might properly find that she was not in such a state of mind at the time of the act as to know its nature or be accountable for it.

THE prisoner was indicted for the murder of her husband, and, on another indictment, for the murder, on the same occasion, of her infant child.

Walford and *Philbrick* for the prosecution.

Ribton for the defence.

The prisoner, who was a person of somewhat weak intellect, had been married to a labourer, her deceased husband, for seven years, and had had four children by him, of whom the child she had killed was the youngest, and was only a few months old. After her confinement she had been ill for some time, and for want of food and necessaries became in the last degree prostrated by physical weakness. Her husband having been sent to prison for a month for some trifling offence, she, with her child, had gone into the workhouse, whither, on account of her weakness, she had to be taken in a fly. While there, she was attended by the doctor for a female disorder, which caused a great loss of blood, and by exhausting the vessels of the brain, tended to weaken it, and so led to mental weakness, as well as the utmost nervous depression. She at times talked wildly of having seen devils, a bright light, &c., and the doctor judged these to be natural and probable results of the causes mentioned, and the chaplain, as well as the doctor, judged these to be signs of insanity. It was even thought that she must be sent to a lunatic asylum, but the physical symptoms abated under medical treatment, and with them the mental symptoms likewise began to disappear. They would, however (the doctor thought), be likely to *re-appear*, if anything occurred to re-excite the physical disorder of the system. Still, when the month's imprisonment of the husband had expired, and he applied for his wife, it was doubted whether she ought to be sent home. However, she did so on the 14th of January, after spending

the day with her husband's parents. While there, they were reading the Bible together, and in making remarks on Christ's temptation, she said that she had been tempted by the devil sometimes to cut her husband's throat, or her own, and should do so very likely some day. They went home in the evening, and early next morning she roused her mother, telling her at first that some one had cut her husband all to pieces, and then that *she* had killed him; and she subsequently said she had killed him with a chopper as he lay asleep, and afterwards killed the child; and that while she was doing it, she heard the devils blundering up and down the stairs, and making a dreadful noise, &c.

Upon this evidence, without calling on the prisoner's counsel,

ERLE, C. J. (to the jury).—Are you of opinion that the prisoner was in a state to know that she was doing what was wrong (*a*)? There was morbid action of the brain:

(*a*) This case well illustrates a real, as contrasted with a colourable, defence, on the ground of insanity, and also, the proper evidence to sustain it. To establish a defence on the ground of insanity, it must be clearly proved, that, at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, *as not to know the nature and quality of the act he was doing, or as not to know that what he was doing was wrong; Macnaghten's case*, 10 Cl. & Fin. 200. And again, in a later case, to entitle a prisoner to be acquitted on the ground of insanity, he must, at the time of the committing of the offence, have been so insane that he did not know right from wrong; MAULE, J., *Reg. v. Higginson*, 1 Car. & K. 129. If, to a charge of felony, the defence set up be insanity, the question for the jury will be, whether the prisoner was labouring under that species of insanity which satisfied them that he was *quite unaware of the nature, character and consequences of the act he was committing;* or, in other words, whether he was under the influence of a diseased mind, and *was really unconscious, at the time he was committing the act, that it was a crime; Reg. v. Oxford*, 9 Car. & P. 525—*per* DENMAN, C. J., ALDERSON, B. and PATTESON, J. But the question is quite distinct, and is one of law for the Judge, whether there is sufficient evidence to *leave* to the jury to sustain the defence thus defined. And although in *Macnaghten's case* it was laid down that, where an accused person is supposed to be insane, a medical man, who has

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there was a state of disease resulting from childbirth, and other causes, which might lead to insanity; and

been present in Court and heard the evidence, may be asked, as a matter of science, whether the facts stated by the witnesses, supposing them to be true, show a state of mind incapable of distinguishing between right and wrong,—this assumes that there are facts which the Judge deems sufficient so to leave to the jury, and also that the medical man is to give his opinion as on a matter of science, i. e. on matters within his proper cognizance *as* a medical man, and what they are this can well illustrate. The medical man, whether he speak as to facts he has himself observed, or as to facts stated by others, is to state his opinion, as a *skilled* witness, on the *facts;* his opinion as to the probable state of the prisoner's mind at the time, *founded on the facts;* (*Regina* v. *Richards*, *ante*, Vol. I., p. 87.) Unless they are facts purely of *medical* cognizance, as the effect of exhaustion of vessels of the brain, as in the present case, it should seem that his opinion is *not* that of a skilled witness, and so not evidence; unless he speak as a person skilled in the phenomena or symptoms of lunacy, from treatment of lunatics, and even then it seems, from the decisions of the House of Lords in *Ferrer's case* and *Macnaghten's case*, it is for the jury to form *their* judgment on the opinions expressed on such phenomena or symptoms. The danger of relying on merely mental phenomena, as delusions, or the like, is, that they may be simulated, and must be taken on the account of the person accused. And there is not any case in which the defence has been sustained without some facts, however slight, capable of proof, and showing insanity probable. In the case of Mrs. Brough, tried at the Surrey Summer Assizes, Guildford, 1854, *coram* ERLE, C. J., for the murder of her children (*Bodkin* and *Robinson* for the crown, *James* and *Hawkins* for the prisoner), the only evidence of actual or probable insanity (i. e. founded on facts prior to the act itself) was, that she had sustained some injury in the head, which, according to the medical evidence, was such as *might* have led to insanity. But not only was there no evidence that it *had*, but all the evidence was the other way, inasmuch as down to the time of the act she had been in charge of her household, and brought up her whole family, as far as appeared, quite sensibly. Upon this slender evidence, coupled with the *circumstances* of the act (which of course can never be *excluded*), and her irrational accounts of it, a theory of "homicidal impulse" was set up for the defence. In a very remarkable charge, the Lord Chief Justice condemned this theory, apart from evidence of real and actual insanity, and impressed upon the jury very forcibly, that persons, by the long indulgence of bad passions, might make themselves subject to homicidal impulses, which at last became, in a certain sense, irresistible, but which, so far from being

there were, *before the act in question*, delusions of the *senses*, which the medical men consider, and might well consider, symptoms of insanity. She seems to have fancied she saw and heard devils, even when no one was in the house alive but herself. If so, that was a delusion of such a nature as to indicate insanity. Her killing her child at the same time was no doubt under the same influence. It is for you to say whether, upon such evidence, you consider she was in such a state as to know the nature of her actions, and to be aware that she was committing a

proper ground of excuse or defence, were at once the result, and the proof, of long continued depravity. As regarded the evidence of insanity—slight as it was—the Lord Chief Justice left it to the jury (of course *defining* insanity, in a legal sense, according to the authorities above quoted), with strong observations on the medical evidence as to its probability. It was of course hardly possible to *withdraw* it from the jury (if it were practically possible to do so), for in some cases the only mode of showing that there was actual insanity at the time is by showing physical or other causes, making it *probable* that it did so exist. But the remarks of the Lord Chief Justice, as to the unsatisfactory nature of such evidence, and the danger of acting on it, were well illustrated in the history and result of that case. The jury acquitted the prisoner on the ground of insanity, mainly, no doubt, on the supposed absence of any rational motive for the act. But afterwards, there was an action for adultery by the prisoner's husband, in which he recovered damages, and it was stated at the time, that the husband's *discovery* of the adultery, and threat of expulsion, had excited the unfortunate woman to the murder of her children in a paroxysm of revenge. So in a later case (*R.* v. *Haynes*, *ante*, Vol. I., p. 606) the theory of homicidal impulse was condemned by BRAMWELL, B.—"The act, being apparently motiveless, is not a ground from which you can safely infer the existence of such an influence. Motives unknown may exist. A morbid thirst for blood would itself be a motive urging to the deed." In that case there *were no* facts to show insanity, and the prisoner was convicted. In a case before BLACKBURN, J., at the Surrey Summer Assizes, where a woman had got up from bed and cut her sister's throat, without any *proved* or *apparent* motive, there was evidence of some injury to the head sustained in India, and some medical evidence that it might suddenly give rise to insanity, and the learned Judge left the case to the jury as above, and the prisoner was acquitted, on the ground of insanity.

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crime. If not, then it would be proper to acquit her, on the ground of insanity.

The jury at once found a verdict of

Not guilty, on the ground of insanity.

Coram Wightman, J.

NEWMAN *v.* CARDINAL.

Lent Assizes.

A creditor having agreed with his debtor to take a growing crop in satisfaction, and the *debtor* giving him a receipt for the amount of the debt, as if for money paid on a sale of the crop, and the creditor having taken possession:—*Held*, that the transfer, though not registered, was good as against an execution creditor.

INTERPLEADER: the issue being, whether, on the 14th December, 1860, certain crops and chattels were the property of the plaintiff, the claimant, or of the defendant, the execution creditor.

Hawkins for the plaintiff, the claimant.

Lush and *J. Brown* for the defendant, the execution creditor.

The plaintiff, the claimant, was a creditor of L., the judgment debtor, for 155*l.*, and they had agreed that he should take in satisfaction of the debt a growing crop of wheat. The plaintiff relied on a transfer, in proof of which he put in the following document, dated December 15, 1860:—

"Received of Mr. Newman 155*l.* for sixteen acres and a half of wheat, now growing on the farm, &c." (signed by the debtor).

The corn was then just above the ground, and the claimant gave evidence that he had hoed and cultivated the farm, and thus been in possession of it after this transaction. The crop had been seized by the sheriff under the execution issued on the 15th July, 1860, before the crop was reaped, but after it was ripe and ready for reaping.

At the close of the case for the plaintiff, the claimant,

Lush, on the part of the defendant, the execution creditor, objected, that either the document put in was a transfer of property within the Bill of Sale Act (17 & 18 Vict.

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c. 36), which clearly included "stock or produce upon any farm or lands," because it expressly *excepted* "such stock or produce, which, by virtue of any covenant or agreement, or the custom of the country, ought not to be removed from the farm" (*a*); or, if *not* such a transfer, then there was *no* transfer of property to the claimant, because there was no note in writing under the 4th section of the Statute of Frauds (*b*).

Hawkins.—There was payment and possession taken; *Alsop* v. *Day* (*c*), and the statute does not apply.

WIGHTMAN, J.—That may get rid of the objection, but I shall reserve the points.

Verdict for the plaintiff (*d*).

(*a*) See Finlason's C. L. P. Acts, Appendix, p. 316, and the note on the subject and cases there cited.

(*b*) It was a *growing* crop. See *Emmerson* v. *Heeley*, 2 Taunt. 38; *Sainsbury* v. *Matthews*, 4 M. & W. 343.

(*c*) 5 L. T., N. S. 12.

(*d*) In Easter Term, *Brown* moved in Exchequer, but took nothing.

INCLEDON *v.* WATSON.

Lent Assizes.

In an action for false representation as to the value of a business, the question will be, not merely whether it was ever made, but whether the defendant *kept it up*, and whether, even if he did, the plaintiff was *thereby induced* to complete the purchase. The amount of a claim *may* be amended at the trial, but will not be so if the damages appear to have exceeded what the plaintiff had really claimed or was entitled to.

DECLARATION, that the defendant was a schoolmaster and tenant of premises, and, with intent to induce the plaintiff to purchase the good-will of the school, falsely represented to the plaintiff that there were twenty-two boarders and twenty-five acres of land to let off; whereby the plaintiff was induced to purchase the good-will for 140*l*., whereas in truth and in fact there were less, &c.

Claim 100*l*.

Pleas: not guilty.

That the plaintiff *was not* induced by the alleged representation to purchase, &c.

Hawkins and *Pearce* for the plaintiff.

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Ballantine, Serjt., and *Holl* for the defendant.

In January, 1860, the defendant had given to a school agent particulars in writing (lost, and not put in evidence), whence he had prepared and published in a school journal an advertisement of the school, as to be disposed of, describing the number of boarders at twenty-two, and the land which could be let off at twenty-five acres. Premium 150*l.* Possession to be given at *Lady-day* next. Just before Lady-day, on the 17th March, the plaintiff entered into negotiations with the defendant and his agent, upon the basis of this advertisement. The negotiations continued during April and May, and the advertisement was kept standing all that time. The agent stated, however, that he had told the plaintiff that he must not depend on the advertisement as correct in all respects. But it did not appear that either the defendant or his agent had told the plaintiff what was the fact, that at Lady-day the number of boarders had fallen to seventeen.

On the other hand, it did not appear that the plaintiff had asked the question whether the number of scholars remained the same.

A prospectus was put into his hands which stated the number of acres to be let off at less than twenty-five, and the defendant said he had never measured the land, and did not know exactly *how* much there was. In point of fact there were only about twenty acres *altogether*. It did not appear, however, that on this point the plaintiff had made any particular inquiries.

On the 24th of June, the plaintiff signed the agreement and paid the premium, which had been reduced to 140*l.* (for a reason which had no regard to the present question between the parties), and on that day he took possession.

Only twelve scholars came back from the vacation.

A return of part of the premium had been claimed and refused.

A plaint had been brought in the County Court for 50*l.*

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and removed by *certiorari*. And the claim in the declaration was for 100*l*.

WIGHTMAN, J. (to the jury).—There is no doubt the representations were false. But the plaintiff alleges that he was *induced by these representations* to enter into the contract. Was that so? Possession was to be given at Lady-day, and the representation must be taken as referring to *that* time. Was he told that there were then only seventeen scholars? No doubt nothing can be more precarious than the good-will of a school, and the number of scholars must fluctuate, especially in prospect of a change. And there was no guarantee that the numbers should *keep up* to the number stated. The question is, was the number wilfully misstated by the defendant at Lady-day? The advertisement, for all that appears, was true when he penned it. But it was kept standing, and the question is, first, whether he told the plaintiff that the number of scholars had fallen to seventeen, and next, whether the plaintiff made the contract on the belief that there were twenty-two? Of course he could *not* if he were told otherwise. *Was* he told otherwise? He was told not to rely on the advertisement as correct. Did he purchase on the faith of the representations made in it?

Verdict for the plaintiff, damages 140*l*.

Hawkins applied to amend the declaration by increasing the claim to 140*l*.

Holl opposed the application, on the ground that the original claim had been only for 50*l*., and further, that the verdict by reason of the excess was invalid.

WIGHTMAN, J., said, if it were to be assailed on that ground he would make the amendment. If not, he did not feel disposed to do so, looking at the *original* claim in the County Court.

Holl thereupon undertook not to move on that ground; but

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WIGHTMAN, J., then refused the application, and, by assent.

Ordered the verdict to be entered for 100*l.* (*a*)

(*a*) *Vide Tebbs* v. *Barron*, 4 M. & Gr. 844, claim not amendable before the C. L. P. Act, 1852; but see *Gibbs* v. *Knightley*, 26 L. J., Exch. 294, (the case of an arbitration), that it is so now at *any* time; sect. 222 allows amendment in *all* proceedings, at any time.

WIGGINTON *v.* DODD.

Lent Assizes.

On a bailment of money to be applied to a certain purpose, a reasonable time must have elapsed before it can be recovered in default of such application; and *quære*, whether such a time *can* have elapsed before a request to return it.

FIRST count: for that the plaintiff delivered to the defendant, and he received from her, the sum of 200*l.*, to be within a reasonable time applied to the purchase of the good-will of a public house, &c.

Averment, that a reasonable time had elapsed.

Breach, that the defendant had not so applied the money, but wrongfully retained it.

Second count, money had and received.

Pleas: *inter alia*, never indebted, and denying that a reasonable time had elapsed.

Prentice for the plaintiff.

Shee, Serjt., for the defendant.

The plaintiff, in *October*, had agreed to lend the defendant 200*l.* to go into a public house, having the lease as a security. A particular public house had been looked at and approved, and the defendant was to have it in a fortnight. It turned out that he could not have it, and he looked out for another. In the meantime the plaintiff's friends dissuaded her from the business, and on the 28th January, this action was brought. It appeared that there had been no request to return the money.

WIGHTMAN, J.—The question then will be under the first count, whether a reasonable time had elapsed before action.

Prentice.—There is the count for money had and received.

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WIGHTMAN, J.—That depends on the same question. For the plaintiff has never asked for the money. If she had, she *might* have rescinded the contract. As it is, it turns upon the question of reasonable time, and it will be for the jury, whether, before any request to return the money, a reasonable time had elapsed to perform the contract.

Prentice thereupon consented to terms, on which

Verdict for the plaintiff.

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Evidence that in a place of resort for pleasure, as a wood, or the like, people have gone about wherever they pleased, there being no definite enduring trackway in any particular direction, but merely temporary and transitory tracks, not passable in wet weather and varying every season, and never proved to be repaired:—*Held*, not evidence on which a jury could properly find either a public highway or a public *right* of resort for air and exercise, or a prescriptive right of way.

TRESPASS for breaking and entering a close of the plaintiff, abutting on the Whitehall Road, in the manor of Woodford, and throwing down hurdles and fences of the plaintiff upon the said close.

Pleas: 1. Not guilty.

2. That the close was not the plaintiff's.

3. Justification, by reason of a common and public highway over the close for all persons to go and return on foot at all times of the year, at their free will and pleasure.

4. That the close was without hedge or fence, and was waste land of the manor of Woodford, and has been used as a place of resort by the inhabitants of the manor. And that within the manor, time out of mind, there has been a certain ancient and approved custom, that the inhabitants of the manor at all reasonable times in the year have had the easement, liberty and privilege, and have used to have the privilege, &c. of *walking in the said close for air and exercise.*

Averment, that the defendant was an inhabitant of the manor, and that the plaintiff had wrongfully enclosed the said land, whereupon, &c. Issue and demurrer.

New assignment of trespasses in excess of the alleged

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rights, and on other parts of the close, and for other purposes, &c. Issue.

Bovill, Lush and *J. Brown* for the plaintiff.

Hawkins, Barnard and *Newman Ward* for the defendant.

The *locus in quo* was part of Woodford Wells Green, in front of the plaintiff's house, and on one side of Whitehall Road, leading from Woodford to Chingford, through "Epping Forest." The Green had been part of the Royal Forest of Waltham, comprising several manors, and among others Woodford Manor, in which the Green lay (*a*). It was the custom of the manor that the lord, with the assent of the homage at a court baron of the manor, should have power to grant land out of the waste, and the plaintiff's house was upon land which had been so granted.

On the 23rd July, 1861, at a general court baron and customary court of the lord (as entered on the rolls), the lord, by his steward, with the consent of the homage, granted to the plaintiff the *locus in quo*, to be holden of the lord by copy of court roll, according to the custom of the manor, the grant to be void, if within two years the grantee did not bring the said land into cultivation as arable, pasture, or meadow (*b*), or if he should build on it without licence.

On the 30th July, the plaintiff enclosed the *locus in quo* with fences or hurdles, and on the very next day (*c*) the

(*a*) So that the *soil* was in the lord; the forestal rights, or royal franchise, in the Crown. The latter, of course, gave no interest in the soil, but would be violated by any *enclosure* without the licence of the Crown. And it did not appear that the plaintiff *had* such licence; nor had he, in fact, until *after* the trespasses. On the other hand, the defendant having no interest under the Crown, could not, and so *did* not, raise the question.

(*b*) This, of course, would be in derogation of the forestal rights of the Crown; but, on the face of the grant, it did not appear that the manor was part of the forest.

(*c*) *Query*, if there was *possession* in the plaintiff sufficient to enable him to maintain trespass, apart from title, on the principle of *Tresidder* v. *Tresidder*, 1 Q. B. Rep. 416; *Every* v. *Smith*, 26 L. J., Ex. 344.

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defendant pulled them down. In August this action was brought.

It appeared that, in 1830, Whitehall Road was made, before which there ran, somewhat in the same direction, a "glade" or opening, in the forest; but it was suggested, on the part of the defendant, that the glade run over the *locus in quo* towards his house, which lay beyond the plaintiff's, towards Chingford. At the making of the road, however, a ditch had been dug (probably for drainage) on the *locus in quo* (*a*), on the side next to the road. Prior to 1830 the whole land was unenclosed, and the green had been an open space in the forest, void of trees and covered with furze, of which, in course of time, it had been cleared, still remaining unenclosed. There was evidence—nor was it disputed—that people had always been used to go over the *locus in quo*, as over the rest of the forest, wherever they liked, and whenever they could; but there was no distinct evidence of any definite way in any particular direction, and though there were "tracks," from time to time, which might last for a few weeks or months, there was no beaten or enduring track in any one direction, which had lasted for years. And it further appeared that the green, like the old forest glades (one of which it was suggested had gone across it), was in wet weather or winter impassable for travellers on foot, who would then be forced to go along the hard road, called Whitehall Road.

Hawkins offered to prove that the inhabitants were used to play games on the green (*b*), but

Bovill objected that there was no plea to raise such a defence, and the evidence was not pressed.

It was admitted, on the part of the plaintiff, that the

(*a*) *Vide supra*, (*c*), p. 846.

(*b*) See *Fitch* v. *Rawlings*, 2 H. Bl. 393, where held that a custom for the *inhabitants* of a place to play games there is good, but not for strangers or persons *coming* there. And see *Smith* v. *Tyson*, 9 A. & E. 406.

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nearest course to Chingford lay across the green, in the direction of the alleged way, but it appeared that it was only in summer or in dry weather that it could be used, and that (to use the language of the witnesses) there was no regular track or footway; "people went anywhere they could." It was admitted that there were transitory tracks, as there were all over the forest, but no *beaten*, worn, or permanent track or footway.

The witnesses for the defendant did not say that the supposed path was passable in wet weather, and even the defendant said he "could not say that there was a *defined path*."

Bovill, in reply, urged that this kind of evidence would not establish *rights* in the public, or in the inhabitants of a place, as otherwise the owner's right of property would virtually be divested in all open unenclosed lands, over which the people were allowed to wander and ramble as they pleased, but that such evidence merely showed a species of *permissive* enjoyment (*a*).

WIGHTMAN, J. (to the jury).—The question is, whether there was a *way* over the spot *where the hurdles were put up*. In one sense there was a way there and everywhere, for it appears that the green was part of the ancient forest, and the effect of the evidence is, that people went wherever they liked. All the witnesses seem to concur in that, that everybody went wherever they pleased. And so, in that sense, the whole forest was one great way. But that is not the sense in which the word is used in the plea; it must be taken in some more definite sense, or else the entire forest must be deemed to be a way. Was there any defined way, in any particular direction? It has been attempted to prove that there was; and it appears that, from a certain point, the course of the alleged way would be the nearest course to Chingford. But it appears also

(*a*) That is, whether of the right of way, or of walking.

that though there were many tracks in different directions, none of them were *enduring;* and that they would be impassable in winter. Before Whitehall Road was made persons would have to force their way through furze, and bushes, and swamps; and it does not plainly appear where the alleged way would have led, or why it should have been used. *Since* Whitehall Road was made the supposed way seems to have been convenient, when passable, to avoid a corner, and save a slight distance in going to houses built since then. The question, then, on the first special plea is, whether there was a right of way on the spot where the hurdles were placed? If you think there was no regular way there, but that people merely went where they liked, find for the plaintiff.

Then as to the alleged *custom*, it is *laid* in the inhabitants; but the proof is wider than the plea, for it appears that *all the world* went wherever they pleased. It may be a question whether that would be a good custom in law; and of course if, in point of fact, it is proved as to all the world, it is proved as to the inhabitants. On the other hand, if the plea be taken to mean that the right is *only* in the inhabitants, it is disproved, for the *proof* shows it to be, if it exist at all, in all the world. Supposing, however, that the plea only alleges that the *inhabitants* have the right, then was there such a custom as is laid?

As regards both pleas, observe that the question is, whether the alleged user was as *of right;* for if they were merely *permissive* usages, the pleas are not sustained.

The jury found that there was *not* a way, and that there was *not* a custom, as alleged.

Verdict for the plaintiff (*a*).

(*a*) *Vide Chapman* v. *Cripps, post,* p. 864.

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Lewes, coram Erle, C. J.

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Although, where it is clearly proved that the prisoner wilfully gave the fatal blow, it is not necessary to show motive or personal malice, or a particular intent to kill the *deceased*; and if he killed A., meaning to kill B., it is clearly murder; yet, where it is a main part of the proof that he killed the deceased—that he meant to kill some one else—it is essential to prove that he had an intent to kill such other person, and that such person was or might be supposed to be at or near the spot, at or about the time of the fatal blow.

THE prisoner, a soldier, was indicted for the murder of one Houghton, at Chichester.

Roupell and *A. Smith* for the prosecution.

Barrow for the defence.

The case for the prosecution was, that the prisoner had shot the deceased by mistake for one of his officers.

The deceased, a student in the college at Chichester, had been shot in a lane leading thereto, and also leading to the barracks, a few minutes before twelve, on the night of the 16th of October. He uttered a loud shriek, which was heard at some distance, and he was immediately after found by a policeman and another man, named Bedford. He was shot just under the breastbone, and was writhing in pain, and said to Bedford something which showed he was in dread of imminent death; but this the policeman did not hear him say. He said to the policeman, "Remove me, or I shall die of cold." He then said something else as to who shot him. He was removed into the college, where the principal spoke to him, and he seemed sensible, but did not speak. He died soon afterwards.

It was proposed, on the part of the prosecution, to prove the statement made by the deceased to the policeman as to who had shot him.

ERLE, C. J., recalled the policeman, and asked him, At the time you came up to the deceased, did it appear to you that he was under the expectation of immediate death?

The policeman said he thought not.

A deposition before the *coroner*, by a deceased witness, is of doubtful admissibility under the old statutes, and *semble*, that it is *not* admissible under 11 & 12 Vict. c. 42.

A dying declaration of deceased cannot be admitted by the Judge merely from his own notion of the nature of the wound as described (without any evidence that the *deceased*, at the time, *believed himself* about to die), unless, at all events, it be shown to have been such as must *necessarily* have caused death in a short time, and such as all men reasonably must suppose to be so.

ERLE, C. J., thought the evidence inadmissible.

Roupell pressed that the nature of the wound itself was such as to show that the deceased must have been under the expectation of imminent death.

ERLE, C. J., said he could not, in the absence of evidence, presume that a man who had been shot through the body must necessarily feel that he was about to die (*a*).

The declaration of the deceased was therefore rejected.

[It was, that the man who shot him was a soldier.]

Roupell then proposed to put in the deposition made by Bedford before the coroner (he having since died), the deposition containing some stronger evidence that the deceased was in expectation of immediate death.

(*a*) Because the question is, in such a case, whether the declaration was made by the deceased under an impression on *his* mind of almost *immediate* dissolution; and it is not enough even that he should have thought that he should ultimately never recover. *Rex* v. *Van Butchell*, 3 C. & P. 629—HULLOCK and LITTLEDALE. And this depends, of course, chiefly on what the deceased *said* respecting the danger in which he *considered himself* to be; and it will, *upon this*, be for the Judge to decide whether the deceased then had that impression on his mind which would render his declaration admissible. *Rex* v. *John*, 1 East, P. C. 357; *S. P.*, *Rex* v. *Wellbourn*, 1 East, P. C. 358; *S. P.*, *Rex* v. *Hucks*, 1 Stark. 523. And though it is no doubt true that the apprehension of danger may appear either from the express declaration of the deceased at the time, or *may be inferred from the state of the wound*, or illness, or other circumstances indicating the same; *Rex* v. *John*, 1 East, P. C. 357; yet, as, if the deceased had been told that his recovery was just possible, and that his wound was not *necessarily* mortal, and that there had been an instance where a person had recovered after such a wound, he after this had made a statement, it has been held that it would not be admissible as a declaration *in articulo mortis*, for the deceased, being told that the wound was *not necessarily* mortal, might still have a hope of recovery; *Rex* v. *Christie*, Car. C. L. 232—ABBOTT and PARK; so, as the Judge, here, could not put the case as worse than that, or, on the evidence, presume that the deceased, at the time, *thought* it was worse, or that he had not such a *hope of possible* recovery, the declaration was not more admissible than if the deceased had been actually *told* as much as in the case cited.

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ERLE, C. J., doubted whether the deposition was admissible under Jervis's Act, 11 & 12 Vict. c. 42, s. 17, "that where a person shall be brought before any *justice of the peace*, charged, &c., *such justice* shall * * * take the statement on oath, &c., and such deposition shall be signed by *the justice* taking the same, &c., and if it be proved that such deposition was taken in the presence of the person accused, and that he or his counsel or attorney (*a*) had a full opportunity of cross-examining the witness, then if such deposition *purport to be signed by the justice*, it shall be lawful, &c." His Lordship, after consulting WIGHTMAN, J., said he should admit the deposition, under the statute of Philip & Mary (*b*), subject to the doubt (*c*), whether that statute was not repealed by Jervis's Act.

Roupell, upon this, declined to press the deposition.

ERLE, C. J., said he thought a sound discretion had been exercised, especially as the deposition would not, in his opinion, much advance the case.

The prisoner, on the night of the 15th, the day *before* the murder, had been told that he was ordered for drill next day, and had uttered some angry words, saying he would not go, and would know who ordered it, and would

(*a*) In murder, the declarations of the deceased, *after the mortal wound* is given, may be received in evidence, though the party did not *express* any apprehension of approaching dissolution; but the *examination of such a person taken by a magistrate extrajudicially* cannot be received; *Rex* v. *Woodcock*, 1 Leach, C. C. 500; 1 East, P. C. 354; *S. P.*, *Rex* v. *Dingler*, 1 Leach, C. C. 504 n.; 1 East, P. C. 357.

(*b*) On the trial of an indictment for murder, an examination of the party wounded, taken by a magistrate at an infirmary, to which the deceased had been taken for the purpose of receiving medical assistance, but in the absence of the prisoner, could not be read in evidence as an examination pursuant to the statute 2 & 3 Phil. & Mary, c. 10; *Rex* v. *Dingler*, 2 Leach, C. C. 561.

(*c*) But *quære*, if the party was in apprehension of approaching dissolution, whether it may be read as a dying declaration *in extremis*? *Rex* v. *Dingler*, 2 Leach, C. C. 561.

go to the battalion order room to find out, and that he would "drill some one." That night, after going to bed, he left the barracks, and there was strong evidence that he had taken a rifle and ammunition with him. In about half an hour a shot was heard near the college, and some one, by the light of the flash, saw a man dressed in what seemed a soldier's great-coat and cap running away (*a*). There was no other evidence as to who fired the shot, but the theory of the prosecution was, that it was an attempt by the prisoner to shoot one of his officers (*a*). There was no evidence, however, of any of them having been walking near the spot at the time. He had not returned to barracks, and a man, described as *dressed* like him, in a soldier's coat and cap, with a musket, had been seen by more than one witness *next night*, near the place where the deceased was shot, standing under the hedge. And this man was so seen there just before the shot was fired. Not far off from the spot the prisoner's rifle was found, loaded, laid down half covered up under a hedge. The prisoner was seen next day, the 17th, three or four miles off, *without* his rifle. And when arrested on that day he was at some distance from Chichester, going towards Petworth. He ran away when he saw the officer, and said he was a deserter, and had left Chichester two days ago. When told of the murder, he said, "I had nothing to do it with." When told that there had been a rifle found, he said, "How do they know it was taken out of the barracks? Have they found one?" When told that it had been found, he said, "It is not mine." After his arrest, he said he had applied in August to Major Bush, the commanding officer of his company, for a "pass" to

(*a*) Upon an indictment for maliciously shooting, it appeared that there were two shootings; but it being questionable whether the first shooting was by accident or design: held, that proof of the prisoner having intentionally shot at the person the second time, was evidence to show that the first was wilful; *Rex* v. *Voke*, R. & R. C. C. 531. But there the prisoner was proved to have fired *both*.

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see his brother, and had been refused; and on another occasion said he doubted not the major would hang him if he could, and that he hoped the major would have him drummed out. He also said that the major had been shot at twice before in China, and that he knew who did it. It came out that several soldiers were out of barracks the night before the murder, but on the night of the murder it did not appear that any other soldier than the prisoner was out, or that more than one rifle was missing. There was, however, no evidence that the major or any other officer would be likely to be in the lane about the time of the shot, or that any of them *had* been there.

At the close of the case,

ERLE, C. J. (to the jury).—There are two questions for you:—First, was the deceased *murdered?* Secondly, was he murdered by the *prisoner?* On the first question there can be little doubt, for if the shot was fired by accident, and with no intent to kill *any* one, the person who fired it, and who must have heard the shriek uttered by the deceased, would have gone to his assistance. It is plain that whoever fired the shot meant to kill some one, and to leave his victim to die (*a*). Then the second question arises, was the prisoner the person who fired the shot (*a*)? Now there is no express evidence that he was, and it is only to be inferred from circumstances. Partly from the evidence of identity; partly from the suggested motive or intent of the prisoner to kill some other person. As to the evidence of identity, it is doubtful and slight, and no one speaks clearly to having seen the *prisoner* near the spot at the time, but only to a person dressed like him, i.e. in the common dress of a soldier. It is true that one or two speak to having seen a man dressed like a soldier, and *with a gun*. And if

(*a*) This the Lord Chief Justice conveyed clearly to the mind of the jury that, if the prisoner fired the shot (wilfully) *at any one, no matter at whom*, he was guilty of murder; and of course, if he fired it at any one, it must have been wilful.

you are satisfied that the prisoner took a gun with him, then that would bear strongly against him, not only as to the identity, but as to the falsity of the statement he made that he had not a gun with him, and also as to the *finding* of a gun near the spot in the way he took. But even assuming that he *had* a gun, that would not be conclusive that he was the man who fired the fatal shot. It is suggested that it is to be inferred that he was so from the fact that he had uttered angry words or threats against any one who had to do with his being ordered to drill next day. But there is no evidence that he had found out who *had* had to do with it, or that he had conceived enmity against any particular person, or that any person against whom he might be supposed to have an enmity was or would be likely to be at the spot at or about the time of the fatal shot. The angry words have a double bearing; they go against the prisoner if they could be taken as denoting enmity against any particular person; but they are rather perhaps in his favour in this view, that they denote a design to desert. The question comes to this: on the whole of the evidence, are you satisfied that *he* fired that shot? That is, fired it intentionally (*a*), for the theory of accidental firing seems (for the reason I have given) untenable.

Verdict, not guilty (*a*).

(*a*) A verdict which met the approval of all lawyers, although great doubt and dissatisfaction was expressed among laymen. It was said that there was no moral doubt of the man's guilt. Nor *was* there, if all the facts were taken as clearly proved, on which the theory of the prosecution was based. But then the *great* fact it required, that the prisoner had *fired the shot*, was *not* clearly proved; even assuming that it was proved that he took a gun with him. For whether that was the gun fired, and he was the man who fired (which no doubt may be taken as facts, in substance the same) must depend, as the Lord Chief Justice pointed out, partly on evidence of identity, which was doubtful, and partly on the assumed or suggested theory of motive and intent, as to which, not only was there *doubt*, but there was an utter blank and defect in the evidence; for it was not proved that any officer who had had to do with the order to drill, or who might be

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supposed to have had to do with it (Major Bush, for instance), was or would be likely to be on the spot at the time the shot was fired. The case for the prosecution went upon the theory that one man had been shot by mistake for another, and the evidence of identity was so doubtful, that though, if it had been *clearly* proved that the prisoner had fired the shot wilfully at any one, it would not have mattered whether he fired at the deceased; yet, as the evidence of identity was so doubtful, and it was sought to eke it out by a presumption that the prisoner was the man who fired the shot, because he had a design to shoot some *one*, it was *essential* to prove that the man whom he meant to shoot was or might be supposed to have been on the spot, otherwise, it is obvious there could be no greater reason to presume that the prisoner had fired *this* shot than any *other shot*, or that the prisoner had fired it rather than any other person. The verdict was supposed to have gone on the notion, that if one man is shot by mistake for another, it is not murder! a notion quite contrary to the clear meaning of the charge, and probably to the common knowledge of all men. But the verdict went upon *this*, that if the main proof or main part of the proof, that the prisoner fired the shot, is, that he meant to kill *some one else* (which, *per se*, rather *negatives* the idea that he did so,) it must at least be clearly proved, that the person whom he meant to shoot was on the spot, or might have been *supposed* to be so. This was not only not proved, but there was no evidence of it, so that the case broke down on what turned out to be its vital point. For, striking that out, the case for the prosecution, even assuming an intent to kill an officer, and even assuming an attempt to do so, on the part of the prisoner, was quite consistent with the theory that he had abandoned the attempt, laid aside the gun, and gone away, and that some other person had fired the shot, either against the deceased or some one else. The only person who spoke to the *personal* identity of the prisoner, as distinguished from the mere common likeness of a soldier's dress, saw him three or four miles off and *without* a gun. The case for the prosecution, therefore, did not bring itself within the definition of good presumptive proof, *viz.*, proof leaving place for any rational theory of innocence. And the case, as reported, as a useful illustration of the doctrine of presumptive proof, as an instructive instance of a case defective in evidence, and as a comment or limitation on the legal rule that evidence of a *particular* intent is not necessary in homicide (as it is not in the *abstract* or always, but is, it will be seen, *practically*, in some cases), as well as for the *collateral* points of evidence decided.

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THE prisoner, a station-master of the Brighton Railway Company, was indicted for the manslaughter of divers persons killed in consequence of a collision between two trains in the Clayton Tunnel. The representatives of the persons killed had brought actions against the company, under Lord Campbell's Act, for compensation, and in all of them the company had paid money into Court, and so admitted the negligence on the part of their servants. The prisoner was a porter at the Brighton Station, and it was his duty on the day in question to start the trains. It being an excursion day, three up-trains came in succession, all of them late, so that none of them could be started at the proper time. There was a rule of the company that under such circumstances no train should be started at intervals of less than five minutes after the preceding one. The case for the prosecution was, that the prisoner had started the trains so that there was only an interval of three or four minutes between the second and third. The first train arrived safely at the Clayton Tunnel (seven miles from Brighton), and passed through safely, and the man at the south or Brighton end of the tunnel, when it entered, telegraphed "train in," but owing to some improper working of the signal at his end, became confused, and on the arrival of the second train, not feeling certain that he had received the signal which authorized him to send on the *second* train, again telegraphed "train in," just as the *second* train had gone into the tunnel. Fearing that the signal might be misunderstood, and that mischief might ensue, he showed the red flag, which he imagined the *second* train had not seen, but which had the effect of pulling up the second train in the tunnel. He again telegraphed to ask, "Is that train out?" upon which the man at the north end of the tunnel, supposing that this referred

Although manslaughter may be maintained where the death was the result of the *joint* negligence of the prisoner and others; yet it must have been the direct result, wholly or in part, of the *prisoner's* negligence, and *his* neglect must have been wholly or in part the *proximate* and *efficient* cause of the death, and it is not so where the negligence of some *other* person has intervened between *his* act or omission and the fatal result.

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to the *first* train, telegraphed, "train out," whereupon the porter at the south end of the tunnel, imagining that all was clear, sent the third train into the tunnel, and this ran into the second, which had come to a standstill in consequence of seeing the red flag, the danger signal.

The grand jury had thrown out the bill against the prisoner, in accordance with the opinion expressed by the Lord Chief Justice in his charge (*a*).

(*a*) His Lordship said the grand jury must be satisfied, before they found the bill, that there was a *primâ facie* case of such criminal negligence as had been the proximate and efficient cause of the catastrophe. The negligence imputed appeared to be the sending on one train after another in a shorter interval of time than, according to the rules, he ought to have done. There had been, however, some mistake on the part of other of the company's servants in regard to the signals. A mistake, indeed, was said to have arisen from the negligence of the defendant. Still, if the particular negligence imputed to the prisoner appeared not to have been the proximate and efficient cause of the catastrophe, the bill for manslaughter ought not to be found; and if it appeared that other causes had intervened, the prisoner's negligence would not have been the proximate and efficient cause of the deaths which had occurred. That this was in entire accordance with the authorities will appear from the most recent cases. The case is to be clearly distinguished from that of *joint* negligence. It is, indeed, well settled that it is no defence in a case of manslaughter that the death of the deceased was caused by the *negligence of others as well as by that of the prisoner*; for if the death of a deceased be caused partly by the negligence of the prisoner and partly by the negligence of others, the prisoner and all those others are guilty of manslaughter; per MAULE, J., *Reg.* v. *Haines*, 2 Car. & K. 368. If it be the duty of a person, as a ground bailiff of a mine, to cause the mine to be properly ventilated by causing air-headings to be put up where necessary, and by reason of his omission in this respect another be killed by an explosion of fire-damp, such person is guilty of manslaughter, if by such his omission he was guilty of a want of ordinary and reasonable precaution, and if it was *his* plain and ordinary duty to have caused an air-heading to have been made, and a man using reasonable diligence would have done it; Ibid. So where an engineer, who had charge of an engine which was worked for the purpose of keeping up a supply of pure air in a mine, neglected his duty, so that the engine stopped, and the mine thereby became charged with foul air, which afterwards exploded and caused the death of one of the miners: held, that in such a case the engineer

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The prisoner was now arraigned on the coroner's inquisition.

Hake for the prosecution.

Denman for the prisoner.

Hake stated that, as he conceived, there was no case to sustain the charge, he should propose, with the sanction of the Court, to offer no evidence.

ERLE, C. J., said that course met with his entire approbation, as he was clearly of opinion that there was no case against the prisoner. His Lordship then directed the jury to find a

Verdict, not guilty (*a*).

could not be convicted of manslaughter on an indictment which did not allege a *duty in him* which he had neglected to perform; WIGHTMAN, J, *Reg.* v. *Barrett*, 2 Car. & K. 343.

(*a*) *Vide supra;* and so in *Reg.* v. *Hughes*, 26 L. J., M. C. 202, Lord CAMPBELL, C. J., stated the *ratio decidendi* thus: Was the death of the deceased the *direct consequence* of the act or omission of the *prisoner?* So per HILL, J., *Reg.* v. *Gregory*, *ante*, p. 155.

QUEEN *v.* BRADFORD.

Spring Assizes.

THE prisoner was indicted for uttering a forged receipt, with intent to defraud his employer.

[The prisoner had been indicted for stealing the money mentioned in the receipt, but the bill was thrown out.]

G. Francis for the prosecution.

Ballantine, Serjt., and *Bidder* for the prisoner.

The prisoner was the prosecutor's agent to manage his property, receive the rents and make payments. He was rather illiterate, and wrote with difficulty, and his wife did most of his writing for him, she writing letters, &c., and

Whether a wife has had her husband's authority, on a criminal charge in a matter in which she acted for him as clerk, must depend on the whole evidence in the case, and is for the jury thereon, not for the Judge, on the admissibility of any particular piece of evidence.

On a charge of uttering a receipt with intent to defraud—the uttering being to the employer, and he appearing to have been indebted to the prisoner at the time:—*Held*, to negative the intent to defraud.

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he signing them. On a document being offered in evidence *wholly* in *her* writing,

Ballantine, Serjt., objected that she could not, without express authority, bind her husband in a criminal case.

ERLE, C. J.—No doubt (*a*); but whether she had that authority must depend upon the whole of the evidence in the case, and be left with the main question for the jury.

It appeared that the receipt in question was in the *prisoner's own* writing. It purported to be the receipt of one Towne, to whom the prisoner's employer was indebted, and to whom the prisoner had professed to his employer to have paid it, by handing him the receipt.

But it also appeared that, at the time, it was doubtful whether the *prosecutor* was not, on the whole account, *indebted to the prisoner*.

Upon this,

ERLE, C. J., said that as, if this were so, there could hardly be proof of a fraudulent intent (*b*), and the *substance*

(*a*) The course of business *or* express authority, or subsequent adoption, may bind the husband, even by *bills* accepted *either* in his name or hers. A bill of exchange, addressed to the defendant by the name of "William B.," was accepted by his wife, by writing across it her own name "Mary B." There was no evidence of any express authority in the wife so to accept the bill; but, on its being presented to the husband after it had become due, he said he knew all about it, that the bill was a millinery bill, (for which the husband appeared to be liable,) and that he would pay it very shortly: held, that he was liable as acceptor; *Lindus* v. *Bradwell*, 5 C. B. 583. And if he put forth her writing as *his*, he will be bound by it as if it were his own. To a count upon a bill by indorsee against acceptor, a plea that the drawer was a married woman at the time of the indorsement, and that her husband did not authorize or consent to her indorsement, was held bad, on the ground that the defendant was not at liberty to deny the maker's power to indorse, after having, by his acceptance of the bill, asserted that she had the power in question; *Smith* v. *Marsack*, 6 D. & L. 363. As to *criminal* responsibility, no doubt it would require his authority, but the *mode of proving it may* be the same as in *civil* cases.

(*b*) The *intent to defraud* in the uttering is of course of the essence of the charge, and where, on the

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of the charge was that the prisoner meant to defraud his employer, the jury had better acquit him.

Verdict, not guilty.

trial of a prisoner for forging a note, it appeared that he had kept the note in his possession, and never uttered or attempted to make any use of it: held, whether the note was made innocently, or with intent to defraud, was for the consideration of the jury, and to be collected from the facts proved; LE BLANC, J., *Rex* v. *Crocker*, R. & R. C. C. 97; 2 N. R. 87; 2 Leach, C. C. 987. And though it has been held that a jury ought to infer an intent to defraud the *person who would have to pay* a forged instrument if it were genuine, although the object was generally to defraud whoever might take the instrument, and the intention of defrauding in particular the person who would have to pay the instrument if genuine did not enter into the prisoner's contemplation, *Rex* v. *Mazagora*, R. & R. C. C. 291, yet where, as here, there was no evidence of intent to defraud the only person who *could* have been defrauded, (for *Towne* could not be defrauded by his debtor being told that he had been paid,) there could be no evidence of *intent to defraud at all.*

Coram Wightman, J.

THE QUEEN *v.* PARR.

Spring Assizes.

The Judge, in a case of felony, has no authority to order an adjournment (i. e. to *another day*) on account of the mere absence of the prosecutor and his witnesses.

LARCENY.

The prisoner had been arraigned and given in charge to the jury, and

Lumley Smith, for the prosecution, had opened the case, when it appeared that neither the prosecutor nor his witnesses were present. It was suggested that, as this was the second Crown Court formed at the close of the day, after the *nisi prius* business had been ended, and as the first Crown Court had already adjourned, probably they had all gone home (living, as they did, at Brighton), not having heard of the second Court, though the officer stated that he had given due notice of it in the first Court.

Under these circumstances counsel applied for an adjournment till next day, but

WIGHTMAN, J., said he had no power, as it was a case

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of felony, to order the adjournment (*a*). It was now too late to wait till the witnesses were sent for. (To the jury.)—There is no evidence against the prisoner, and as he has been given in charge to you, I cannot order an adjournment (*b*). You must therefore acquit him, and he will be discharged in due course of law.

Verdict, not guilty.

(*a*) That is, until next day. The proper meaning of the word adjournment is to another day. The only cases to be found of so-called adjournment in cases of mere defect of evidence are cases of suspension of proceedings for a short time, the jury not going away, to come again another day.

(*b*) ALDERSON, B., so held in a similar case at Maidstone (*ex relatione* G. Francis). There was a ruling *per* WATSON, B. (*vide ante*, Vol. I., Fost. & Fin. p. 382, *Reg.* v. *Tempest*), that the Judge had no power to adjourn, in the sense of waiting until a later time on the *same day*; but that case being cited in the arguments of *The Queen* v. *Fernandez*, Q. B. 1861, COCKBURN, C. J., disapproved of it, and pointed out cases cited in *Archbold's Cr. Pr.*, where the Judges have suspended the trial for a certain time on the *same* day, the jury remaining in the box. That is very different from letting them go, to come again another day, (which of course cannot be done in a case of felony,) or locking them up, which, it is conceived, cannot properly be done for a mere default on the part of the prosecution, or a mere defect in the proof.

PHILLIPS AND ANOTHER *v.* BURT.

Spring Assizes.

Whether the "description of the residence" in a bill of sale is sufficient to satisfy the statute, is a collateral question for the Judge, and is not for the jury.

INTERPLEADER issue. The plaintiffs, being creditors secured under a bill of sale, the defendant, execution creditor.

M. Chambers and *J. Brown* for the plaintiffs.

Hawkins and *Willoughby* for the defendant.

On the bill of sale being produced,

Hawkins objected that (*a*) the address was not sufficient,

(*a*) The Bill of Sales Act, 17 & 18 Vict. c. 36, s. 1, requires that the bill of sale, or a true copy thereof, and of every attestation, shall, together with an affidavit of the time of such bill of sale being given, *and a description of the residence* and occupation of the person

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as it did not particularize; but as it appeared that there was no other person of the same name at the place mentioned, and that it would be easy to find him by the address given,

WIGHTMAN, J., held it "sufficient description of the residence" to satisfy the statute.

Afterwards,

Hawkins, in addressing the jury, urged that the address was not sufficient, on which

WIGHTMAN, J., said:—I shall not leave that to the jury. It was a matter for me to determine, on putting in the bill of sale, and I have determined it (*a*).

It appeared that the bill of sale was of *all* the assignor's effects, and that there had been no valuation. [It did not realize enough to satisfy the claimant, but it was suggested that some goods had been removed.]

Hawkins, in going to the jury, urged that the object was not to protect the goods for the *claimant*, but against *all* creditors, and that therefore it was invalid.

WIGHTMAN, J. (to the jury).—Was the object really to

making or giving the same, * * * and of every attesting witness to such bill of sale, be filed, &c. It has been held, that this must be at the *same time* (*Grindell* v. *Brendon*, 28 L. J., C. P. 333), although the description *in the affidavit* will suffice (*Nicholson* v. *Cooper*, 27 L. J., Ex. 393), or in the bill of sale itself, if verified by the affidavit, and referred to therein; *Routh* v. *Roublot*, 25 L. J., Q. B. 240; and see also *Pickard* v. *Bretts*, 29 L. J., Ex. 18. And as regards the *nature* of the description, the *rule* laid down in all the cases is, that it must be such as will be reasonably sufficient to enable the parties to be discovered and identified. Thus it may be either the place of business or the place of *abode*, i. e. sleeping; *Blackwell* v. *England*, 27 L. J., Q. B. 124; *Attenborough* v. *Thompson*, Ibid, Ex. 23. In which respect the rule is similar in principle to that which prevails in regard to descriptions in schedules of insolvents, i. e. that it must be reasonably sufficient for the above object.

(*a*) *Vide Cooper* v. *Dawson*, vol. 1, p. 551, and *Boyle* v. *Wiseman*, 24 L. J., Ex. 284.

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pass the property to the claimant, or was it merely colourable? If so, find for the defendant, the execution creditor.

Verdict for the defendant, the execution creditor.

CRISP *v.* CORDERY.

Spring Assizes.

A case coming down for trial on writ of inquiry may be tried, though it has not been entered.

WRIT of inquiry to assess damages in an action of trespass and trover.

On the case being called on, it appeared, and was objected, that it had not been *entered*,—*Archbold's Practice*, p. 954, being cited, to show that a case coming down by writ of inquiry must be entered as if it were a record.

WIGHTMAN, J.—The case need not be entered, or, if it need be, it may now be entered.

The case was accordingly tried.

Rigby for the plaintiff.

Hawkins for the defendant.

Verdict for the plaintiff, damages 40*l.*

Maidstone, coram Erle, C. J.

CHAPMAN *v.* CRIPPS AND OTHERS.

Kent Spring Assizes.

The mere use by people of tracks in a wood, where they were free to wander about as they pleased, is not necessarily enough to show a dedication of such tracks to the public as public footways.

TRESPASS for breaking and entering land of the plaintiff (abutting on the north on land used as a way, on the east on land of the plaintiff, and on the south on a public footway), and breaking down fences of the plaintiff.

Plea (*a*): that there was of right a common and public highway over the said land for all persons to go and return, pass and repass, on foot, at all times of the year at their free will and pleasure; wherefore the defendants, having occasion to use the said way, at the said time, did, because

(*a*) *Vide Schwinge* v. *Dowell*, *ante*, p. 849, a very similar case.

the fences obstructed the same, so that, without breaking them down, the defendants could not then pass on foot as they were entitled to have done, broke the same down, &c. Issue.

M. Chambers, *Hawkins* and *Brown* for the plaintiff.

Shee, Serjt., for the defendants.

The *onus* being on the defendants on the above plea,

Shee, Serjt., began, and the case on their behalf was, that the land originally was open, as part of Tunbridge Wood, and that Lord Camden had purchased it about twenty years ago, and had been since clearing and enclosing it, and had let portions of it on building leases, and had so let a portion to the plaintiff. That on the land as it originally existed there were divers ancient footways, which, though they had not been repaired, were public highways. And that the fence in question was erected across a road, which had been laid out, on the site of one of these ancient footways. It led to several other places and highways.

ERLE, C. J.—That is not material, the question being, whether it is itself a highway.

Shee, Serjt., said, as matter of evidence it might be material on that question.

The witnesses for the defendants proved that in point of fact the alleged way led to other places and public footways, and that it had itself been used as a footway for sixty years past. About thirty years ago it was cleared and grubbed up, and adjoining land, so cleared, was let to cottagers for allotments. About twenty years ago the carriage road was made on the site of this way, and it then was gravelled and hardened, and gates were set up at the ends. Before the carriage road was so made, a small stream ran along the way, and the footpath was on one side of it. The old footpath lay among the trees till the

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allotments were made. Then the trees were grubbed up, and the defendants' witnesses described it as "a way leading to the allotments." They said, indeed, it was always a footway, but admitted that it was not passable at all times, but only in favourable weather (*a*). Moreover, it clearly appeared that the supposed way was in the wood, and the language the witnesses used was, they used to play there, and that people used to "wander about the wood," and the like. It further appeared that for the last sixty or seventy years the wood had been in gradual process of clearance. The effect of the evidence seemed to be very much (in the language of one of the witnesses) that people used to go where they liked in the wood. Some of the witnesses said that there never was any *made* path, and it seemed to have been merely a track in the woods, passable only in dry weather, or at all events not easily passable in wet weather. In fact, one of the defendants' witnesses said, "it was a little track, about eighteen inches wide." There were other paths, or tracks, through the wood, all of the same kind. Another of the witnesses said it was a "sort of blind path," and he had not considered it as a *public* path. Another called it a "blind track among the stubs." It was plain that there had never been any repairs of the old footway, and no attempt was made to prove that there had been.

Chambers called witnesses on the part of the plaintiff, who proved that the wood had been where the way was claimed, and that since it was grubbed it had not been used as of right, or without interruption, but that "rough characters" were often turned back. They said, moreover, that the "way" was but a mere track, like many other tracks in the wood, and led nowhere but through the wood. Thirty years ago, when a building estate was

(*a*) The plea, it will be observed, alleges that the subject has a *right* to pass *at all times*. Hence the importance of evidence of repairs having been enforced, so as to enable the subject to pass in all weathers.

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formed, called Camden Park, there was a roadway made, a lodge, and lodge-gates put up at one end, leading into the park, and since then the user had been constantly interrupted by lodge-keepers. The person who had had charge of the estate for more than twenty years was called to prove this, with many other witnesses.

In the course of this evidence,

The jury intimated that they were satisfied there was no way.

Shee, Serjt., in reply, on the part of the defendants, urged that there was evidence of a dedication to the public of the old footway, and if so, then no amount of interruption could deprive the public of their right over a highway.

ERLE, C. J. (to the jury).—That is so, if there was once a highway. But the question is, whether there ever was a highway. There could not be without a dedication by the owner to the public for the purposes of a highway. No doubt user by the public may be evidence of such a dedication; but then it is only evidence, to be considered with a view to the nature of the case, and all its circumstances. There was a wood; this was a path or track through it, like many others, leading in different directions. People wandered wherever they pleased in the wood, and of course made tracks, and when the weather was dry used these tracks. But they were never repaired, and in wet weather were hardly passable. Are you of opinion that there was a dedication by the owner to the public for the purposes of a highway, or that the user was merely permissive, to wander where they pleased in the wood? If there was no dedication for the purpose of a highway, find for the plaintiff.

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APPRENTICE, discharge of, justification for, plea of, allowed to be amended at trial. If an apprentice, whose master's business lies in precious articles constantly lying about, is an habitual thief, the master may discharge him; and charges of theft made to his father will be privileged, but the master will be liable in slander for false charges made to third parties. *Cox* v. *Mathews*, 397.
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(*a*) This decision, as to the nature of the matter to be referred, has been confirmed in Exchequer; but as to the power to refer at *nisi prius*, *vide post*.

(*b*) This case was decided per HILL, J., after consulting POLLOCK, C. B., and accords with the preceding case. *Pell* v. *Addison*, decided by WILLES, J., so that though the Exchequer have since held that there is no power to refer at *nisi prius*, the authorities are about equal either way, and the practice, ever since the act passed, had been so to refer. *Vide* Vol. I.

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executors to devise of leasehold, evidence of. *Bikker* v. *Beeston*, 410.

ASSIZE, Judges of, their authority in Court. *In re the Sheriff of Surrey*, 235. (And see note on the subject, 239, 240.)
power of, to commit for contempt witness refusing to answer. *R.* v. *Charlesworth*, 337.
power of, to discharge jury in such case. Ibid.
to adjourn trial in case of felony, after prisoner in charge of jury. *R.* v. *Parr*, 861.
to *postpone* trial for absence of witness. Where, in a criminal case, a witness for the prosecution is so ill as not to be able to travel, the Judge may, at his discretion, permit the deposition to be read to the jury, under the 11 & 12 Vict. c. 44, s. 17, or postpone the trial to the next assizes. *R.* v. *Tait*, 553.

ATTACHMENT of debts, effect of execution on. Although the judgment debtor has been arrested, the debt is still garnishable. *Aliter* as to arrest of judgment *creditor*. *Hartley* v. *Shemwell*, 379.

ATTORNEY, authority of client not liable for acts of. The owner of land involved in litigation in Chancery, held not liable for the acts of a person acting as her attorney in the Court and of his own motion, under, as he supposed, its authority, but not her general attorney, and without her privity or actual authority in the particular matter. *Oxenham* v. *Collins*, 172.
where an attorney had distrained upon a tenant whom he had put into possession on the part of the owner, and contrary to an agreement, he supposed he had authority in law to make in the owner's name, but which it appeared he had not: held (*a*) liable in trespass; and *semble*, not liable for false representation (*b*). *Oxenham* v. *Smythe*, 220.
action by, for costs, defence to duty of. In an action by attornies for the costs of a defence, which failed, they having been absent on the day of trial, and some of the witnesses consequently not being in Court:—*Held*, that they were entitled to

(*a*) There is an error as to this in the report and marginal note, where omit the word "not."
(*b*) The Court of Exchequer have since held that he was *not*.

ATTORNEY—*continued.*
recover, notwithstanding the verdict had passed against their clients, the defendants, unless the jury thought that the absence of the witnesses had caused the loss of the verdict, and so made the plaintiffs' services *wholly* valueless. *Dunn* v. *Hallen*, 643.
liability of, to action for negligence. In an action against an attorney, alleging that he was retained to conduct the defence of the plaintiff on a criminal charge, and that through his negligence the plaintiff was convicted (not alleging that he was innocent):—*Held*, that the plaintiff, to recover more than nominal damages, must prove that he was convicted *mainly* through the defendant's negligence, and the negligence charged being, not taking the proofs of witnesses who were in Court ready to be examined, but whom the counsel, on the plaintiff's own statement, did not wish to call, and whom the plaintiff did not insist on calling:—*Held*, that the question for the jury was, whether the defendants had done everything which, under all the circumstances, was likely to be of any use; and *quære*, whether the action was maintainable at all. *Hutch* v. *Lewis*, 467.
rights of, as to costs. An agreement with an attorney, that he shall get his costs out of the fund in the suit, implies the condition that he is continued in the conduct of the suit until there is a fund in the Court available for costs. *Hollings* v. *Booth*, 220.
clerk of authority to receive money by way of *deposit* must be special. *Cornelius* v. *Harrison*, 758.

AUCTIONEER, liability of, to employer, for neglect of duty in not getting purchaser to sign his name or pay deposit; damage. *Hibbert* v. *Bayley*, 48.
right of, to remuneration for sales by private contract through their agency, although by act or default of *employer*, turning out abortive. *Clark* v. *Smythies*, 83.
action by, for not allowing to sell; damages. *Topping* v. *Bull*, 408.

AUTHORITY, ratification of, may be after action. An order to do work on the premises of the defendant, by a person professing to act in his behalf, though having no authority to do so, may be ratified by the defendant's agent, even after action, and it is enough that there is an offer to pay, not only without any acknowledgment, but with a disavowal of the authority. *Richardson* v. *Oxford* (*Countess of*), 466.
to contract on credit, secretary, &c. to club. A member and director of a coal club, formed on the principle of buying coals wholesale out of the *paid up* subscriptions, *held*, not liable for coals ordered on *credit* by the secretary. *Wood* v. *Finch*, 449.
banker's clerk to cash railway debenture. *Croxon* v. *Moss*, 539.
of attorney's clerk to receive money by way of deposit must be *express*. *Cornelius* v. *Harrison*, 758.

AUTREFOIS ACQUIT, plea of, on discharge of jury, held bad. Where a man was indicted, pleaded not guilty, and was given in charge to a jury who retired to deliberate, and had not agreed upon a verdict by the time all the rest of the business before the Court was finished, when they were discharged by the presiding Judge, and the prisoner remanded:—*Held*, that the dismissal of the jury was not equivalent to an acquittal, and that the prisoner might lawfully be put upon his trial a second time. The same rule prevails, whether in cases of misdemeanor or felony. *R.* v. *Davison*, 250.

BAILMENT, what is, under Fraudulent Trustees Act. *R.* v. *Garrett*, 14.

BANKER, duty of, as to negotiable instruments. Where a correspondence as to the conversion of a railway indenture, payable in London, had been carried on between the owner, the plaintiff and his brother, a clerk in the office of a stock-broker, in the stock-broker's *name*, and the debenture had been remitted by plaintiff to his brother to get it cashed, and, falling into the hands of his employer,

BANKER—*continued.*
the stock-broker, was by him presented to the defendants, bankers in Liverpool, who cashed it (less the discount), and were sued by the plaintiff for the amount, the stock-broker having failed:—*Held*, that it was a question of fact for the jury, whether the defendants were authorized to cash it. *Croxon* v. *Moss*, 539.

BANKRUPTCY, proceedings in, when evidence against party. *Mackley* v. *Pattender*, 62.
when conclusive. Ibid.
effects of, admission of. Ibid.
assignees of. Ibid.
title of assignees to property, on ground of fraudulent preference, delivery of property under pressure. *Pennell* v. *Heading*, 744.
pressure must be such as likely to cause transfer. *Kinnear* v. *Johnson*, 753.
transfer must have been really by *reason* of the pressure. *Kinnear* v. *Walmisley*, 756.
assignment by trader of stock, &c. for old debt *and further* advances (though bills still running for the amount), *not* an act of bankruptcy. *Whitmore* v. *Dowling*, 135.
reputed ownership, evidence of. To make out a case of reputed ownership it is not enough to prove continued possession by the assignor, if the real ownership appears to have been known to creditors, and for aught that appears to *all* creditors. *Hall* v. *Day*, 568.

BENCH WARRANTS, issuing of, practice of Judges as to. *R.* v. *Whittaker*, 1.

BILL OF EXCEPTIONS, allowed to be amended by Judge at Chambers. *Salisbury* v. *Gladstone*, 256.

BILL OF EXCHANGE, action on; pleading in. In an action on a bill payable by instalments, it appearing that the action was commenced on the last day of grace, but there being no plea to that effect, nonsuit refused, but leave to move given—per ERLE, C. J. *Gasken* v. *Davis*, 294 (*a*).
a bill appearing not to have been due when the writ issued, but the only plea being a denial of the acceptance:—*Held*, that the point did not arise at the trial, *quære* as to an arrest of judgment. *Hinton* v. *Duff*, 561 (*b*).
pleading on, when divisible and construed distributively as to consideration. In an action on a bill given to drawers for a balance of account on a purchase, and by them indorsed to plaintiffs, the defence being, that it was given for a larger amount than really due, the amount admitted to have been due being paid into Court, and the pleas being to the residue, denying consideration; *semble*, that the plea was divisible, and might be construed distributively, and, if not, it was amendable, as to the amount pleaded to. *Ashcombe* v. *Ellam*, 306.
notice of dishonour; dispensation, evidence of. An application by the drawer of a bill on behalf of the acceptor for time:—*Held*, evidence from which a jury might infer that he had authorized an arrangement for renewal, dispensing with notice of dishonour; and *held*, that after dispensation *no* notice was necessary. *North Staffordshire Loan Company* v. *Wythies*, 563.
action on, defence to, failure of consideration, force of goods, *onus* of proof as to *total* failure on the defendant. *Clark* v. *Holmes*, 79.
when given for price of specific article. *Horsfall* v. *Thomas*, 785.
no defence either on ground of failure of consideration or warranty, when it has answered its purpose to some extent. Ibid.
in an action on a bill signed by defendant as surety, a plea of fraud in the principal, with notice thereof to the plaintiff before the advance, which was the consideration, allowed to be altered into a plea of notice of revocation of the suretyship. Such a

(*a*) *That* case was not moved; but in a subsequent case, in which POLLOCK, C. B., had ruled in the same way, on the Midland Circuit, *Hinton* v. *Duff*, the C. P., *absente* ERLE, C. J. and the above case not being cited, held the contrary. *Sed quære de hoc.*
(*b*) Overruled in C. P., *absente* ERLE, C. J.; *et vide supra* (*a*).

BILL OF EXCHANGE—*continued.*
defence failed, as there was a contract to make the advance, and the notice was after half-notes had been sent. *London Monetary Company* v. *Guthergood*, 298.
action on, defence to, notice to indorsee, right to begin. In an action on a bill or note, and a common money count, special pleas to the one, and never indebted to the other, if the plaintiff does not undertake to prove a *different transaction* on the latter count, the defendant is entitled to begin. And if the second count is, in fact, for the consideration of the bill, (with charges,) and the question is, the authority of a party to receive the money and give the bill or note, on behalf of the defendant, it is in effect all one transaction and one question. Notice to the indorsee's agent in the transaction is notice to the indorsee, and if a party suspects a fraud and does not ask as to it, lest he should know it, he has constructive notice. *Oakley* v. *Ooddeen*, 656.
loss of, on plea of bill given. Under sect. 87 of the C. L. P. Act, 1854, a plaintiff *held* entitled to have a plea of a bill given for and on account of the claim and *lost*, struck out on his giving an indemnity to the defendant. *Ringrose* v. *Blizard*, 375.
payment of, effect of, is for jury. *Sunley* v. *Cunard*, 548.
defence to, notice of, evidence of. *Oakley* v. *Ooddeen*, 659.

BILL OF LADING, action on, when made in the name of the owners of goods not known to the shipowner until after shipment. *Lidgett* v. *Perrin*, 763.
question as to parties to contract on, is for jury. Ibid. (And see cases cited *in notis*.)
action on, by shipper; duty of, to send lighters to receive cargo, &c. *Alexiadi* v. *Robinson*, 679.
duty of *shipowner* to use due diligence. *Carali* v. *Xenos*, 740.
transfer by, when collusive and colourable, and with intent to defraud creditors. *Whitmore* v. *Lloyd*, 36.

BILL OF SALE, effect of, as to clause allowing seizure and sale on default of payment after notice. *Brightley* v. *Norton*, 722; *Rogers* v. *Mutton*, 768.
right of action by assignor for seizure and sale without due notice, damage; cases as to. Ibid.
description of residence, sufficiency of. *Philips* v. *Burt*, 862.
for the *Judge* to determine. Ibid.
effect of, as to execution creditors. Ibid.
when given in embarrassed circumstances. *Kinnear* v. *Walmisley*, 756.
of *ship*; effect of, as to memoranda or agreement preliminary to. Memoranda made preliminary to the execution of, and formal, which could not be included in terms in the bill of sale subsequently executed in pursuance of the preliminary agreement, are not necessarily displaced, and do not necessarily cease to have effect, or to be admissible in evidence upon the execution of the more formal contract. *Chapman* v. *Callis*, 161.

BOARD OF WORKS, &c., negligence by, liability of contributory negligence. An action maintained against a board of works for not keeping a sewer clean, whereby it became choked up, and the overflow therefrom ran into the plaintiff's premises. *Meek* v. *Whitechapel Board*, 144.
contributory negligence, liability of board or contractor. Contributory negligence is no answer to an action grounded on negligence unless it was the *proximate* cause of the injury. And in an action against a public body and their contractor, for an injury caused to a vessel by its grounding on piles driven into a river, in the course of works authorized by their act:—*Held*, no answer to the action, that the master of the ship, *not* seeing the piles, steered it over them:—*Held*, also, that as the piles were driven in according to the contract and plans, the board were liable jointly with the contractor, though the latter *might* be separately liable for negligence in not giving notice, &c. *Brownlow* v. *Metropolitan Board*, 604.

BREACH OF AGREEMENT, what is evidence of, when acts of third party may be so, carrying on business by third party. *Clark* v. *Howard*, 125.
excuse of, impossibility of performance. *Pole* v. *Cetovich*, 104.

BRICK-KILNS, when nuisances. Brick-kilns near, but as far as practicable from, a dwelling-house, purchased with notice, *held*, no nuisance; and, on account for keeping ash heaps in the process of brick making, plaintiff held entitled only to nominal damages. *Bamford* v. *Turnley*, 231.

BROKER, duty and liability of, on employment to ship and insure. *Smith* v. *Price*, 748.
to sell; duty to value with due care. *Solomon* v. *Barker*, 726.
to take up policy. *Xenos* v. *Wickham*, 735—739.
liability of, on chartering ship without authority. *Mitchell* v. *Kuhl*, 709.
sharebroker, when liable for dealings of his clerk. *Webb* v. *Challoner*, 120.
authority of clerk of, to receive money on railway debenture. *Croxon* v. *Moss*, 539.
shipbroker, right of, as to commission on charter-party between two brokers. *Hibbert* v. *Owen*, 502.
right of, to commission, as between two brokers. *Gibson* v. *Crick*, 766. (See *Cunard* v. *Van Oppen*, Vol. I., p. 716.

BUILDING CONTRACT, effect and operation of. *Coker* v. *Young*, 98.
effect of guarantee of, by employer, in event of builder becoming unable to complete. *Lee* v. *Fisher*, 591.

CANCELLATION, evidence of, in case of policy. *Xenos* v. *Wickham*, 735.

CAPTION OF EXAMINATIONS, defect in, taken on another charge, 2.

CARRIAGE OF GOODS, actions for negligence in. See "Carrier."
action against the person for *delay* in. *Carali* v. *Xenos*, 742.
of cattle, injury to, through overcrowding of, action for, by *one owner* against *another*. *Raynor* v. *Childs*, 775.

CARRIER, action against; Carriers' Act, plea of demand of extra rate under. *Behrens* v. *Great Northern Railway Company*, 303.
evidence of negligence in conveyance of goods, condition of, when received by, and when delivered. *Higginbotham* v. *Great Northern Railway Company*, 796.

CATTLE, carriage of, injury to, through overcrowding, action for, *by one owner against another*. *Raynor* v. *Childs*, 775.

CERTIFICATE, when not an order, &c., for the payment of money. *R.* v. *Mitchell*, 44.
for costs, wilful and malicious, when given. *Williams* v. *Ward*, 659.

CHAMPERTY, what is. (See cases on subject.) *Kennedy* v. *Broun*, 801.

CHARTER-PARTY, effect of, action, condition or warranty in (as to sailing "*with all possible dispatch*"), in a *printed form*, not the less binding for that. *Dixon* v. *Heriot*, 760.
manner of condition in, evidence of effect of party treating charter as subsisting. Ibid. 760.
effect of memorandum on, evidence as to. *Hibbert* v. *Owen*, 502.
A memorandum in a printed form of charter-party between two brokers, used by the charterer, "commission to be paid to charterer, to whom the vessel is to be addressed, on her return to London," the charter being only for an *outward* voyage, and making no mention of a *homeward* voyage; and the ship not having returned direct from the port of discharge, but taken a cargo elsewhere:—*Held*, to require evidence that the memorandum was understood by the parties to be part of the contract, and that in mercantile usage it applied in such a case to the return cargo, and meant that the charterer should collect the freight and receive commission on it. Ibid.

CHEQUE, action on; production of; proof by defendant that post dated, to exclude effect of document. *Oliver* v. *Mortimer*, 127. (See *Dunsford* v. *Curlewis*, Vol. I., 702.)

CHILD MURDER, by wilful neglect of the mother in not *taking* nourishment; conviction for manslaughter not allowed. *R.* v. *Knights*, 46.

CHILD, examination of, as witness, proper questions to put to as to sanction of an oath. *R.* v. *Holmes*, 788.

CHURCHWARDENS, ejectment by, for waste lands of parish. *Appleton* v. *Morrey*, 167.

COAL CLUB, liability of trustees of, for coals ordered by secretary on credit. *Wood* v. *Finch*, 447 (*a*).

COLLATERAL ISSUE, what is, not an inquiry going really though incidentally to the question at issue. *M'Kewan* v. *Thornton*, 600.
as, on a plea of misrepresentation, an inquiry whether the defendant's attorney had not heard from plaintiff the matter alleged to have been concealed. Ibid.
a defendant, charged with an indecent assault, having been cross-examined as to alleged indecencies as to other persons, and denied them, evidence in disproof of these imputations on one side, or in support of them on the other, was rejected, as relating to issues quite collateral; the plaintiff being bound by the defendant's answers as to these collateral matters. *Tolman* v. *Johnstone*, 66.
as to description of address in a bill of sale. *Philips* v. *Burt*, 862.

COMMISSION, right of broker to (when *several* intervene), as between *introducing* broker and *working* broker. *Gibson* v. *Crick*, 766.
right of auctioneer to. See "Auctioneer."

COMPARISON of handwriting, when allowed in cross-examination of attesting witness of will. *Cresswell* v. *Jackson*, 24.
in cross-examination of an attesting witness to a codicil, he denying that it was in his handwriting; other documents admitted by him to be in his writing were allowed to be submitted to the jury for the purpose of comparison of handwriting, under sect. 27 of the C. L. P. Act of 1854. Ibid. (And see note, p. 25, and *Birch* v. *Ridgway*, Vol. I., 270, as to the construction and application of the enactment generally.)

CONFESSION, sacramental, seal of, law as to; privilege does not extend to acts or words *out* of confession. *R.* v. *Hay*, 4. (And see note on subject, 6, 7.)

CONTRACT in writing, when made; previous memoranda. *Chapman* v. *Callis*, 161.
in writing, making of, within Statute of Frauds; letter of defendant, in answer to parol proposal, may be sufficient. *Catling* v. *Parry*, 140.
proposal on one side not *answered* by the other, until after a delay of some months, and then not *assented* to until after some further time, *held* no contract. *Emmott* v. *Riddell*, 142.
construction of, not to carry on new business; what is breach. *Clark* v. *Howard*, 125.
to take assignment of lease, effect of condition in. *Burton* v. *Banks*, 213.
construction of, to pay agent by commission, raises no implication of yearly hiring. *Nayler* v. *Yearsley*, 41.
nor to pay commission on orders sent after agency has ceased. Ibid.
performance of, prevented by unforeseen circumstances; reasonable time. *Pole* v. *Cetovich*, 104.

(*a*) In Trinity Term, 1862, a rule for a new trial made absolute, the rules not having been put in at first trial: and the verdict as to the *evidence* not being satisfactory.

COPYHOLD, rolls, not signed by steward, received in evidence. *Bridger* v. *Huett*, 35.

COSTS, amount of, necessary to carry damages in slander, &c.; jury allowed to be informed as to; cross-examination as to; when allowed. *Wakelin* v. *Morris*, 26.
certificate for. See "Certificate." (And see "Highway.")

COUNSEL, right of, to sue for fees. (And see note on subject.) *Kennedy* v. *Brown*, 801.
admissions by; statements made by. *Haller* v. *Worman*, 165.

COVENANT, construction of, in lease, by lessee that there shall be no communication across demised land; effect of. *Borgnis* v. *Edwards*, 111.

CRIMINAL PROCEEDING, what is; *quære*, whether indictment for non-repair of highway is. *R.* v. *Field*, 498. (But see *R.* v. *Broke*, 1 F. & F. 514, *contra*.)

CRIMINAL PROCEEDINGS, what are so; indictment for nuisances or obstructions to highways. (See note on subject, p. 499.)
arrest in, when allowed on bench warrants. *R.* v. *Whittaker*, 1.
commencement of, what is; when issuing of warrant is so. *R.* v. *Hull*, 16.

CRIMINAL PROCEDURE, joinder of counts, stealing and receiving. *R.* v. *Ward*, 19.
obligation of prosecutor under recognizances. *Queen* v. *Hargreaves*, 790.
trial, right of prisoner to make statement. *Queen* v. *Munzano*, 65.
postponement of trial at the instance of prosecutor. *R.* v. *Mobbs*, 18.
the judge may at his discretion permit the deposition to be read to the jury. *R.* v. *Tait*, 553.
trial, cross-examination of witness as to statements before the committing magistrates. *R.* v. *Peel*, 21.
discharge of jury, plea of *autre fois acquit*, upon. *Queen* v. *Dawson*, 250.

CROSS-EXAMINATION of witness in crown case, as to his statements before committing magistrate. *R.* v. *Peel*, 21.
of attesting witness, on an issue as to validity of will on comparison of handwriting. *Cresswell* v. *Jackson*, 24.
as to the probable amount of the costs of the action, when allowed. *Wakelin* v. *Morris*, 26. (And see note on subject, p. 27.)
of party, as to collateral facts to his discredit denied by him; evidence of those facts to contradict him not allowed. *Tolman* v. *Johnstone*, 66.

CROWN CASES, practice as to; arrest in, on bench warrants. *R.* v. *Whittaker*, 1.
dying declaration, when admissible. *R.* v. *Clarke*, 2; *R.* v. *Peel*, 21.
examination of deceased, when admissible, on wrongful caption. *R.* v. *Clarke*, 3.
evidence in, confession to priest. *R.* v. *Hay*, 4.

CUSTOM OF TRADE, must be reasonable, and is not so if unrighteous and dishonest. *Paxton* v. *Courtnay*, 131.

DAMAGE, in action for neglect of duty—by auctioneer, when nominal. *Hibbert* v. *Bayley*, 48.
by attornies. *Hatch* v. *Lewis*, 467.
in actions of tort, when too remote. *Priestley* v. *Maclean*, 288.
in action against broker for selling under value and without due valuation. *Solomon* v. *Barker*, 726.
in action against broker for chartering a ship to plaintiff without authority from owner. *Mitchell* v. *Kahl*, 310.
in action against attorney for professing to let, and without authority. *Oxenham* v. *Smythe*, 220.

DAMAGES, principles as to, in slander. *Wakelin* v. *Morris*, 29.
evidence of, in case of carrier, goods damaged. *Higginbotham* v. *The Great Northern Railway Company*, 796.
breach of promise of marriage, general inquiries as to defendant's property. *Kerfoot* v. *Marsden*, 160
in action for seizing and selling goods under bill of sale on supposed default, without notice. *Brightley* v. *Norton*, 724; *Rogers* v. *Mutton*, 768.

DEBENTURE, railway, payment of, by broker to clerk of broker. *Croxon* v. *Moss*, 539.

DEBTOR AND CREDITOR, effect of appropriation. *Burland* v. *Nash*, 687.
effect of payment. *Sunley* v. *Cunard*, 548.

DEBTS, transfer of, agreement for, when valid. *Webber* v. *Mowbray*, 310.
necessity for *assent* of all parties. *Burland* v. *Nash*, 687.

DEED, omission in, by mistake, equitable plea of. *Scott* v. *Sykes*, 191.
plea of fraud to. *Wright* v. *Campbell*, 393.
date of, when explainable. *Edwards* v. *Philips*, 102.

DEPOSITIONS. See "Dying Depositions."
cross-examination upon. *R.* v. *Peel*, 21.

DETINUE, damages in; any subsequent detention must be made the subject of a second action. *Leader* v. *Rhys*, 399.

DISPENSARY, medical officers of, when personally liable for drugs supplied to, on their order. *Luckombe* v. *Ashton*, 705.

DISTRESS, action for excessive, when maintainable by each of several tenants distrained on. *Wilkinson* v. *Ibbett*, 300.
justification for fraudulent removal. *Inkop* v. *Morchurch*, 501.

DYING DECLARATIONS, when admissible, if declarant conceive himself dying, though the surgeon does *not*. *R.* v. *Peel*, 21.
but the Judge will not admit it merely on his own impression as to the nature of the wound, even founded on the surgical evidence, without any evidence that the *deceased* thought himself about to die. *R.* v. *Cleary*, 850.

EJECTMENT: amendment at trial, by adding names of parties as plaintiff. The Judge has power, at the trial, to amend the writ and proceedings, by adding the names of parties as plaintiffs in whom the legal estate is vested (as where by mistake the action is brought in the name of the *cestui que trust* instead of the trustee), so as to raise the real question to be tried. *Blake* v. *Done*, 575 (*a*). (And see note on the subject, p. 576.)
party cannot be joined without his *consent*; and if title appears to be jointly in another, plaintiff cannot recover without proof of transfer or consent to joinder. *Frampton* v. *Williams*, 603.

EMBEZZLEMENT, mis-casting and false entries evidence to show design. *R.* v. *Richardson*, 343.

EQUITABLE PLEAS: right of way omitted by mistake in deed. *Scott* v. *Sykes*, 191.
on guarantee; misrepresentation. *M'Kewan* v. *Thornton*, 594.

(*a*) But the Court of Error has just held, that the name of a party, even in the case of husband and wife, cannot be added as defendants, save under sect. 32 of C. L. P. Act, 1852, by consent. *Garrard* v. *Giubelli*, T. T.

INTERPLEADER, issue in, evidence on, transfer of growing crops. *Newman* v. *Cardinal*, 840.
effect of bill of sale; question on, whether real or colourable. *Philips* v. *Burt*, 863.
description of residence in, collateral issue as to. Ibid.

INTERROGATORIES, when necessary, to discover document *not* in possession or control of party, and serve *subpœna duces tecum* on the party who has it. *Wright* v. *Bunyard*, 192. (And see note on subject, p. 195.)

ISSUE, on pleading, effect of. *Lynn* v. *Comer*, 244.

JOINDER of parties, amendment as to, at trial, when allowed in ejectment. *Blake* v. *Done*, 575. (And see note on subject.)

JUSTIFICATION for dismissal of editor of newspaper, misconduct or neglect. *Edwards* v. *Levy*, 95.
amendment of plea of, when allowed, as to instances of alleged misconduct. Ibid. 96.

LANDLORD AND TENANT, rights and liabilities of; contract by tenant to keep in repair, effect of. *Gange* v. *Lockwood*, 115.
breach by pulling down. Ibid.
contract by tenant not to allow passage over property demised, effect of; what is breach. *Borgnis* v. *Edwards*, 111.
effect of covenant to repair, &c. *Scales* v. *Lawrence*, 289.
notice to quit by collector of rents, held not good. *Pearse* v. *Boulter*, 133.
notice according to custom of the country. *Higg* v. *Berrington*, 246.
surrender, evidence of. *Lawrance* v. *Fox*, 435.
ejectment by landlord for nonpayment of rent. *Cotsworth* v. *Spokes*, 390.

LEASE, contract to assign, effect of. *Snell* v. *Bicknell*, 56.
covenants in effect of. *Gange* v. *Lockwood*, 115.
covenant in. *Borgnis* v. *Edwards*, 111.

LEAVE AND LICENCE, plea of. *Hilton* v. *Green*, 821; *Moxon* v. *Savage*, 182.

LIBEL, action for, privileged publication, comments in a newspaper upon a publication by plaintiff. *Paris* v. *Levy*, 71.
publication of a report of a self-constituted committee charging plaintiff with bribery: held *not* privileged. *Wilson* v. *Reed*, 149.
author of, when liable, even after recovery against publisher. *Fresco* v. *May*, 123. (See *Harrison* v. *Pearse*, Vol. I., p. 567, as to damage for different publications.)
privileged publication, what is; comment on conduct of public officer; matter of public interest; reasonable and honest belief. *Turnbull* v. *Bird*, 520.
reasonable and *honest* belief of charges; letter by subscriber to a charity to the committee impugning the moral conduct of the secretary; letter in answer to committee thereupon, and oral statements before committee during inquiry: held privileged, if made in reasonable and *honest* belief that charges were true. *Maitland* v. *Bramwell*, 623. (And see *Humphreys* v. *Stilwell*, 590. *S. P.*)
action for, pleading in plea of justification, failure in proof of, liability for costs on. *Cory* v. *Bond*, 241.

LIGHTERS, obligation of consignee to send. *Alexiadi* v. *Robinson*, 679.

LUNACY, defence of, in criminal cases; evidence of, what is sufficient. *R.* v. *Law*, 836. (And see note on subject.)

MALICIOUS ARREST, action for, evidence to sustain it, affidavits insufficient and untrue. *Nevill* v. *Loadman*, 313.

MALICIOUS PROSECUTION, action for, evidence in, of expression of opinion on part of jury on trial of charge, not admissible. *Hibberd* v. *Charles*, 126.
absence of reasonable cause, evidence of malice. *Payne* v. *Revons*, 367.

MANDAMUS to lord of manor, pleadings in. *R.* v. *Dare*, 355.

MANSLAUGHTER, by excess of violence. *R.* v. *Hopley*, 202.
by stabbing, after provocation by repeated blows. *R.* v. *Eagle*, 827.
by negligence: medical man administering wrong medicine by mistake. *R.* v. *Bull*, 201.
the negligence of the prisoner must have been the proximate and efficient cause. *Queen* v. *Ledger*, 857.
what amounts to, in cases of *negligence*, where several persons concerned in a duty, culpable negligence of *particular prisoner* must have lead to death. *R.* v. *Gregory*, 153.
not enough that it must have been the result of the negligence of *one or other* of them. Ibid.
person not liable unless his negligence was the proximate and efficient cause of the result; railway station master held not liable when other persons' negligence had intervened. *R.* v. *Ledger*, 857.

MARRIED WOMAN, action by, when maintainable for earnings after order on desertion by husband. *Thomas* v. *Head*, 88.
precedent of such order. Ibid. (*in notis*), 90.
right of, to sue. *Shingler* v. *Holt*, 487. (And see note.)
liability of husband. *Paule* v. *Goding*, 585.

MASTER, when not liable for goods ordered by servant without authority to order on credit. *Staveley* v. *Uzzielli*, 30.
when liable for losses on share transactions entered into in his name by his clerk, being *aware* of them. *Webb* v. *Challoner*, 120. (And see *Aste* v. *Montague*, Vol, I. 264.)
when liable in tort for acts of servant. *Limpus* v. *General Omnibus Company*, 640.

MASTER AND SERVANT, rights of, as to dismissal for misconduct. *Edwards* v. *Levy*, 94.
what is misconduct. Ibid. 95.
wilful disobedience of order, dismissal for. *Churchward* v. *Chambers*, 229.
in an action by a servant, who had been retained under an annual salary, but had assented to a proposal not to be paid further salary until works should be resumed, which had not in fact been resumed:—*Held*, that it was for the jury whether the original contract had been put an end to; and, if so, the defence arose under a plea of rescission. *Hopkins* v. *Wanastrocht*, 368.
on a contract in writing, within the statute, in general terms for the employment of the plaintiff:—*Held*, that it might be shown by parol, that he was employed in a particular capacity; and, as a question whether he had *wilfully* disobeyed a *lawful* order, *held*, that it was for the jury whether the order was within the scope of that employment, and whether, even if so, the disobedience was "wilful." *Price* v. *Mouatt*, 529.
liability of master to servant for injury arising from negligence of fellow servant; contributory negligence; principle of exemption; exemption from its operation; personal negligence of master. *Holmes* v. *Worthington*, 533.
liability of master for *wilful* act of servant. *Limpus* v. *General Omnibus Company*, 650.

MEDICAL OFFICERS of dispensary, hospital or other charitable institution; their liability for drugs, &c., supplied thereto on their order. *Luckombe* v. *Ashton*, 705.

MEDICINE, careless administration of, criminal liability for. *R.* v. *Bull*, 201.

MONEY LENT, action for; evidence, pleading never indebted; effect of plea of. *Parnell* v. *Stock*, 138.

MURDER, what is, constructive, by privity to felony with violence, in which death ensues. *The Queen* v. *Franz*, 580.

NEGLIGENCE, action for, liability of contractor and employer; contributory negligence. *Brownlow* v. *Metropolitan Board of Works*, 604.
action for, maintained against a board of works for not keeping sewers cleansed. *Meek* v. *Whitechapel Board of Works*, 144.
evidence of contributory negligence admissible under not guilty. Ibid.
in an action against a railway company for an injury sustained through falling down some stairs at their station :—*Held*, that it was not enough to show that the stairs were of improper condition or construction unless the fall was caused thereby. *Davis* v. *London and Brighton Railway Company*, 588.
action for, in case of gas company. *Blenkiron* v. *Great Central Gas Company*, 438.

NISI PRIUS PRACTICE: entry of record after time expired, when allowed. Notice of an application to enter the cause after the expiration of the usual time should be given to the opposite party. *Banks* v. *Dean*, 165.
entry of. A case may be tried though not entered, or may be entered at the time of trial, (if parties are all present). *Crisp* v. *Cordery*, 864.
order of, effect of, for particulars, plans, &c., when not observed. In an action of trespass, pleas, not possessed; and also a justification under a right of way all over the *locus in quo*; an order having been made at the last assizes for a plan to be marked by the plaintiff so as to show the places at which the alleged trespasses were committed; and there having been no application for the plan on the part of defendant since notice of trial, an application on his behalf, to postpone the trial because of the non-delivery of the plan or particulars, &c. *Beard* v. *Watson*, 33.
application for postponement of trial at instance of *plaintiff*; practice is to accede to. *Stevens* v. *Esling*, 136.
application for postponement by defendant, on ground of absence of witness. In an action on a bill of exchange against the drawer and indorser, the only plea denying the indorsement, an application on the part of the defendant to postpone the trial on account of the absence of the acceptor, sworn to be a material witness, and to be absent in Scotland, was refused, it not appearing that any endeavour had been made to obtain his evidence under 17 & 18 Vict. c. 34, or otherwise. *Wilkinson* v. *Ward*, 173.
plea allowed to be added on application to Judge at assizes after cause entered, and before trial. *Myers* v. *Barrett*, 35.
challenge of jurors must be with cause. *Pearse* v. *Rogers*, 137.
and it is no cause of challenge that in a previous case between the same parties a juryman has shown a dissatisfaction with Judge's ruling. Ibid.
right to begin, on plea of accord and satisfaction, *plaintiff* entitled. *Price* v. *Eastern Counties Railway Company*, 133.
in actions on bill or note, and for consideration. In an action on a bill or note and a common money count, special pleas to the one and never indebted to the other, if the plaintiff does not undertake to prove a *different transaction* on the latter count, the defendant is entitled to begin. And if the second count is, in fact, for the consideration of the bill, with charges, and the question is, the authority of a party to receive the money, and give the bill or note on behalf of the defendant, it is in effect all one transaction and one question. *Oakley* v. *Ooddeen*, 656.
admission of documents, effect of. *Mackley* v. *Pattender*, 62.
on plea of fraud, *Tindall* v. *Baskett*, 650.
in action on policy. *Foley* v. *Tabor*, 663.
amendment at trial, when allowed; plea of justification; instances of alleged misconduct. *Edwards* v. *Levy*, 96.

NISI PRIUS PRACTICE—*continued.*
in statement of contract, to raise question really in controversy between the parties. *St. Losky* v. *Green*, 108.
amendment of declaration, when allowed. *Farrer* v. *Cock*, 537.
after amendment and demurrer, before trial, *quære*, whether an amendment will be allowed at the trial, so as to get rid of the demurrer, and also to evade a variance arising on the evidence of the party applying to amend. Ibid.
trial, amendment of pleadings at. On an issue taken on a plea raising a failure of a contract by reason of non-approval of an engineer, an amendment, by replying a *waiver*, not allowed. *Irlam* v. *Dunn*, 163.
in an action of trespass by a tenant against his landlord, who justified under a clause in the lease allowing a notice to quit, which had been given, and the plaintiff had only *denied* it, and had not pleaded a *waiver* of it, but sought to set up such waiver in consequence of something that occurred during the trial:—*Held*, that the waiver could not be shown on the pleading as it stood, but should have been specially pleaded, and that the fact that it had not been so pleaded, and was not only set up as an after-thought in the course of the case, was strong to show that it had never taken place, but if it really *had*, leave would have been given to amend by pleading it, supposing it to have appeared the real question in controversy between the parties before the trial. *Evans* v. *Whittingstall*, 175.
in an action on a bill of exchange, a special plea allowed to be added, as substitution for others on the record, raising a substantial defence, not inconsistent with others allowed to remain. *Myers* v. *Barrett*, 34.
in an action upon a promissory note, to which the defendant had pleaded that he did not make the note, leave was given to amend the pleadings upon the morning of the trial, by adding an equitable plea, that the defendant signed the note as a witness only, and not as a maker. *Morris* v. *Miller*, 551.
amendment, when allowed at trial, adding notice of another statute, on plea of not guilty by statute. *Morris* v. *Wise*, 51.
not allowed when there ought to have been notice of action, or when plaintiff clearly entitled to a verdict in any view. Ibid.
amendment of writ on Nisi Prius record, when allowed. *Bust* v. *Hancock*, 57.
trial, postponement of, at instance of *defendant*, on *what terms*. An application to postpone a cause on account of the absence of a witness, allowed on condition that, in the event of speedy execution being granted, the four days should count from the day on which the cause originally stood for trial. *Parnell* v. *Stock*, 217.
trial, right of defendant's counsel to sum up the *whole* evidence or only his own. Willes, J. *Gilford* v. *Davis*, 23 (*a*).
Cockburn, C. J.—*Scott* v. *Queen* (*a*).
document called for at trial and refused, party so refusing cannot afterwards make use of it. *Collins* v. *Glashon*, 47.
if in examination in chief the plaintiff is asked as to the contract and services that there was a contract in writing, the defendant may offer evidence that there *was*, as on a collateral issue for the Judge. *Cox* v. *Couveless*, 139.
production of documents, notice to produce, effect of documents in possession of party's banker. *Wright* v. *Bunyard*, 193.
in an action upon a contract in which the consideration was a bill of exchange given by the plaintiff to the defendant, who had notice to produce it, but as the *voir dire* stated that before the notice he had discounted it with his banker. *Held*, that it must be proved either by production or secondary evidence under the notice to produce; but *quære*, whether such secondary evidence was admissible; *semble*, that it was not, and that the plaintiff's course was to have had a discovery of its custody and served the banker with a *subpœna duces tecum*. Ibid.

(*a*) These decisions are apparently contrary to each other; but that of Cockburn, C. J., is the later, and is in accordance with the wording of the section in the C. L. P. Act, 1854, which is not "*his* evidence," but "*the* evidence." But see note explaining the cases.

NISI PRIUS PRACTICE—*continued.*
where document now in possession of party's attorney. Where document was proved to have been in the actual possession of a party to the action, or to be now in the possession of his attorney in another action:—*Held*, that secondary evidence was admissible, notice having been given to that attorney to produce it; and, *semble*, that it would have been so even *without* such notice to the attorney. *Irwin* v. *Lever*, 296
pleadings, effect of. If, in a count for money lent, the only plea is never indebted, and it appears that the money was once advanced on an understanding to be repaid, even although *afterwards* this was altered, the *plaintiff* must have verdict. *Parnell* v. *Stock*, 138.
evidence of contributory mischief, admissible under not guilty. *Meek* v. *Whitechapel Board of Works*, 144.
nonsuit, may be at any time before verdict given. *Blenkiron* v. *Great Central Gas Company*, 437.
cannot be if special plea not withdrawn. There cannot be a nonsuit if there is any issue on which there is evidence for the jury, and the plaintiff declines to withdraw it from them. *Paule* v. *Goding*, 585.

NISI PRIUS RECORD, effect of, as to date of issue. Where the question arises at the trial, whether the cause of action arose before the commencement of the suit, the date of the writ, as stated in the *nisi prius* record must be taken as the true date; and the proper course, if it is erroneous, is to apply at Chambers to have it amended according to the writ. But *semble*, that if the point were not the real question in controversy between the parties, the *writ* might be amended at the trial. *Bust* v. *Hancock*, 57.
ordered to be amended, to make it accord with pleadings delivered. *Chamberlain* v. *Streather*, 257.
record, when withdrawn. Where there has been an order to try at a particular sittings or assizes, the record cannot be *withdrawn*. *Oakley* v. *Odoon*, 312.
particulars annexed to. If particulars are not annexed to the record, under Rule 19, Hilary Term, 1853, the cause may be struck out as irregularly entered. *Coulton* v. *Hanson*, 312.
amendment of, effect of order for. An order to amend the entry on the *nisi prius* record, &c., *held*, to authorize an amendment of the judgment roll, the judgment being for the defendants (upon a nonsuit), and they not having the *nisi prius* record. *Cobbett* v. *Wood*, 405.

NONSUIT, may be at any time before verdict. *Blenkiron* v. *Great Central Gas Company*, 437.
but cannot be, where special pleas, unless plaintiff consents. *Paule* v. *Goding*, 585.

NOTICE TO PRODUCE, document in hands of banker of party. *Wright* v. *Bundyard*, 193.
proper course by interrogatories. Ibid.

NUISANCE TO HIGHWAYS, what is transitory: use of engine likely to alarm horses. *Watkins* v. *Reddin*, 629.

OWNER, where bound by payment to person apparently in the position of his agent, in case of debenture or security payable to bearer. *Croxon* v. *Moss*, 539.
in the case of warrants and other *indicia* of property. *Osborn* v. *Thomas*, 385.

PARTNER, liability of. *Stephens* v. *Reynolds*, 147; *Edwardson* v. *Thompson*, 570.

PAYMENT INTO COURT, in distress, as to trespasses up to or after a particular time, effect of as admission. *Oldfield* v. *Price*, 80.

PAYMENT, after action, in satisfaction of debt *and costs*. *Henderson* v. *Hayter*, 128.
effect of, is for jury. *Sunley* v. *Cunard*, 548.
appropriation of. *Burland* v. *Nash*, 687.

PERJURY on written document, secondary evidence in. *R.* v. *Milnes*, 10.

PETITION OF RIGHT, precedent of pleadings in; procedure on trial of. *Scott* v. *The Queen*, 633.

PLEADING, effect of taking issue on. *Lynn* v. *Comer*, 244. (And see note on subject, p. 245.)
equitable plea in trespass; right of way omitted in deed by mistake. *Scott* v. *Sykes*, 191.

PRACTICE, writ of summons, irregularity in, against married woman alone. *Dobson* v. *Easton*, 371.
trial of issues of fact and law. *Turner* v. *Barnes*, 256.
notice of trial may be given with replication when it is only in denial. *Furlong* v. *Garrett*, 148.

PRINCIPAL AND AGENT, payment to agent, when binding principal; negotiable instrument. *Croxon* v. *Moss*, 539.
authority of alleged principal, how shown; evidence; previous acts or acknowledgments. *Philpot* v. *Stock*, 180.
liability of principal for *fraud* of agent. *Tindall* v. *Baskett*, 650.

PRISONERS, several, severing in defences, 788.

PROHIBITION to County Court, when not granted because title is in question. *Jenkins* v. *Davis*, 270.

PROSECUTOR, recognizances of, liability on. *R.* v. *Hargreaves*, 790.

RABBITS, action for damage done by. *Hilton* v. *Green*, 821.

RAILWAY COMPANY, liability of; evidence of damage. *Raynor* v. *Childs*, 775.

RAILWAY ENGINE, liability for result of sparks from. *Fremantle* v. *London and North-Western Railway Company*, 337.
negligence in user of; in action for negligence in the use of an engine with a flaw or defect in it, the question is, whether the flaw or defect practically and by the use of ordinary and reasonable care could have been detected. *Stokes* v. *Eastern Counties Railway Company*, 691.
liability of station-master for negligence, criminally, and of company, civilly. *Queen* v. *Ledger*, 857.

RAPE, action for, not maintainable. *Wellock* v. *Constantine*, 791.

REPAIR (see Lease), covenant to, effect of. *Gange* v. *Lockwood*, 115.

SALE OF GOODS, action for not accepting goods sold, credit unexpired, no defence in. *Foster* v. *Eddes*, 103.
to servant or agent. *Williamson* v. *Barton*, 544.
evidence; entries in books, effect of. *Charlton* v. *Allen*, 549.
action for not accepting goods; fraudulent tender by seller. *Masters* v. *Henry*, 781.
title of vendee of consignee; transfer collusive and colourable, and with intent to defraud creditors. *Whitmore* v. *Lloyd*, 38.

SHIP, sale of, fraud in, by agent of vendor, liability of principal for. *Tindall* v. *Baskett*, 644.
contract to build, completion of; acceptance. *Blyth* v. *Samuda*, 430.

SHIPBROKERS, liability of, to consignors, on representations that ships are to sail. *Simpson* v. *Young*, 426.

SHIPOWNER, actions by, against charterer for not consigning to the charterer's agent "free of commission." *Russell* v. *Griffith*, 118.
action by, on charter. *Lawson* v. *Burness*, 793.

SHIPPING, liability of shipper for freight, &c., effect of shipping note as to. *Dickenson* v. *Lano*, 188.
shipowner's rights against charterer. *Russell* v. *Griffith*, 118.
shipowner, liability of, to passenger. *Lloyd* v. *Shaw*, 413.
right of shipowner to have cargo unloaded on quays, if not sent for by consignee. *Alexander* v. *Robinson*, 679.
liability of, for not using due diligence to unload cargo. *Caroli* v. *Xenos*, 740.
insurance of; defence to, concealment of cargo. *Foley* v. *Tabor*, 663.

SHOOTING, right of; what it involves: how far it excuses trespasses on farm. *Hilton* v. *Green*, 821.

SLANDER, action for, on a trader; words, when imputing insolvency. *Gostling* v. *Brooks*, 76.
evidence as to meaning of words. *Martin* v. *Loei*, 654.
privileged communication, what is; words spoken by a medical officer of a public school or charity to the steward, to the effect that the butcher sent bad meat, held privileged. *Humphreys* v. *Stilwell*, 590.
so words, by subscriber to a charity, spoken to committee in course of an enquiry as to the secretary. *Maitland* v. *Bramwell*, 628.
action for, damages in, when nominal; inquiry as to costs. *Wakelin* v. *Morris*, 26.
privileged communication by subscriber to a charity. *Maitland* v. *Bramwell*, 623.
by speaker at a meeting for the election of an overseer. *George* v. *Goddard*, 689.
the occasion being privileged, it is for the jury whether the words are fairly within it. Ibid. *Et vide Hancock* v. *Case*, 711.

STAMP, documents requiring; agreement for hire of goods, not mentioning value. *Chittenden* v. *Day*, 77.
tender signed by builder referring to specification signed by the surveyor, *held* to *require* stamp. *Coker* v. *Young*, 98. (And see note as to cases, ibid., p. 100.)
agreement (void as lease) under which tenant holds premises. *Golden* v. *Taylor*, 110. (And see *Mott* v. *Turnage*, Vol. I., 6)
on agreement; exemption from "hire:" and an agreement by the master of a ship to take out goods, he himself working the same, held within the exemption. *Cornforth* v. *Danube Railway Company*, 197.
exception as to "sale of goods;" agreement with auctioneer as to sale of goods. *Topping* v. *Bull*, 408.

STOCK, charging order on. *Smith* v. *Youde*, 376.

STOPPAGE IN TRANSITU, right of, when arising on nonpayment of bills. *Oakford* v. *Drake*, 493.

SURGEON, action against, on employment by third party. *Pimm* v. *Roper*, 783.

TENANCY, evidence of, in ejectment. *Hogg* v. *Berrington*, 246.

TRESPASS, right to bring action for person in occupation as servant, not tenant. *White* v. *Bayley*, 385.
a person put in possession of crops of farm, and part of house, suing person in possession of other part for not giving it up. *Edwards* v. *Bond*, 817.
action of, liability of parties to, for staying unreasonable time. *Oldfield* v. *Price*, 80.
count for entering house and taking fixtures, plea of not possessed, taken distributively. *Moxon* v. *Savage*, 182.
leave and licence. Ibid.
plea of not possessed, effect of. *Bikker* v. *Beeston*, 410.

TRESPASS—*continued.*
licence in law, in case of insurance company. *Oldfield* v. *Price*, 83.
payment into Court, effect of. Ibid. 80.
pleading in, equitable plea of right of way by mistake omitted in conveyance. *Scott* v. *Sykes*, 191.

TRIAL, postponement of, when action and prosecution for same cause. *R.* v. *Bowles*, 371. (And see "Nisi Prius Practice" and "Criminal Procedure.")

TROVER, action of, retaining possession of goods, conversion. *Fothergill* v. *Lovegrove*, 132.

UTTERING forged instrument, with intent to defraud. *Queen* v. *Bradford*, 859.
evidence of, absence of such intent. Ibid.

VALUATION, duty of broker as to, when employed to sell. *Solomon* v. *Barker*, 726.

VALUER, duty of, action for work by defence to. *Whitty* v. *Lord Dillon*, 69.

WARRANTY, action on, for falsely warranting seed to be rape, evidence, damage, re-sale, loss to customers. *Lovegrove* v. *Fisher*, 128.
defence founded on, evidence of. *Prideaux* v. *Murray*, 225; *Jackson* v. *Harrison*, 782.
defence on natural flaw. *Horsfall* v. *Thomas*, 785.

WAY, right of, by deed, equitable plea of, by mistake omitted in deed. *Scott* v. *Sykes*, 191.
obstructions of, distinction between public and private right. *Berridge* v. *Ward*, 208.
evidence of. Ibid.
particulars and plans referred to at sale. Ibid.
private way not necessarily over every *part* of land subject to it. *Hutton* v. *Hamboro*, 218.
evidence of, user by the public (whether as public or private way), in regard to places of favourite resort, as woods or waters, or the like, how far evidence of user *as of right*, or of dedication by the owner to the public. *Schwinge* v. *Dowell*, 846; *Chapman* v. *Cripps*, 864.

WIFE, authority of, to bind husband, evidence of, in criminal cases. *Queen* v. *Bradford*, 859.

WORK AND LABOUR, action for, as builder, extra, when allowed. *Cohen* v. *Young*, 98. (And see *Johnson* v. *Weston*, Vol. I., p. 693.)
contract for, effect of. *Routledge* v. *Farnham Board*, 407.
action for, defence in, work wholly valueless. *Whitty* v. *Dillon*, 67.
as valuer, what is worthless. Ibid.
as attorney, what is *not* so. *Dunn* v. *Hallen*, 652.

YEARLY HIRING, implication of. *Nayler* v. *Yearsley*, 41.

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